F. N. Balch

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MASSACHUSETTS BAR ASSOCIATION

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HERBERT PARKER, of Lancaster, 1914–1915.
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CHARLES E. HIBBARD, of Pittsfield, 1916–1917.
ARTHUR LORD, of Plymouth, 1917–1918.
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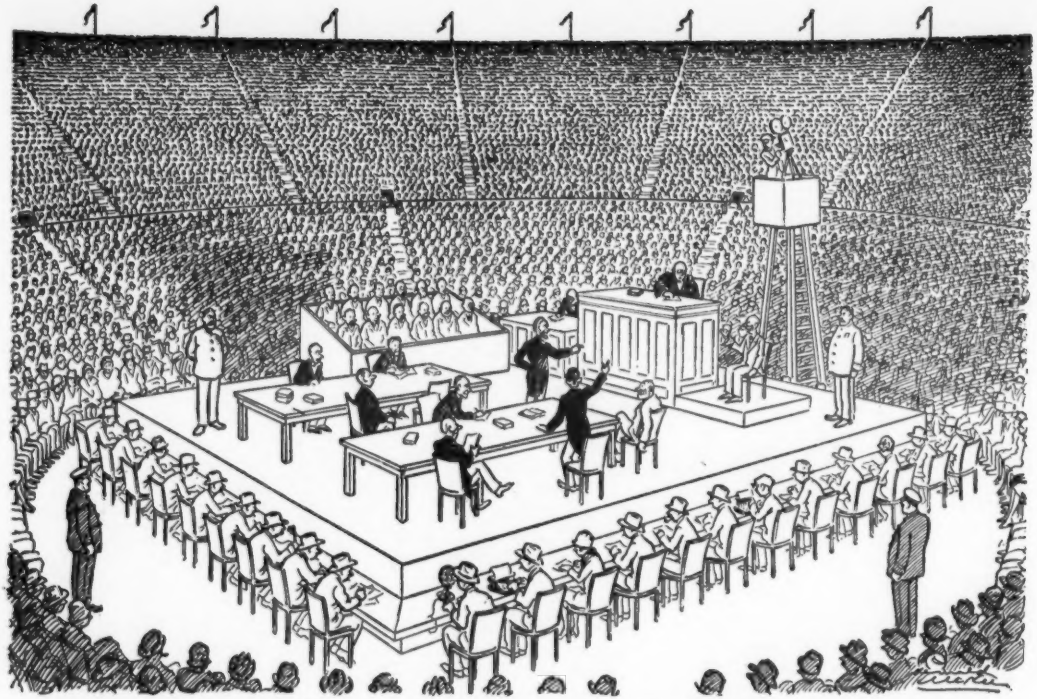

1931—Logical evolution of the "big" murder trial. Promotion by Tex Rickard. Daily "Gate," $1,200,000. Everybody happy.

SEVENTEENTH ANNUAL MEETING.

The Seventeenth Annual Meeting of the Massachusetts Bar Association was held at the Hotel Bancroft, Worcester, on Saturday, December 18, 1926, at eleven o'clock A. M. About forty members were present from different parts of the State. The President, Hon. Franklin G. Fessenden, presided.

THE SECRETARY.—Mr. President, as the report of the last meeting was printed in the QUARTERLY for January, 1926, I do not believe the meeting wants to hear it read.

The records were approved without reading.

REPORT OF THE EXECUTIVE COMMITTEE.

To the Members of the Massachusetts Bar Association:

At the Special Meeting of the Conference of Bar Association delegates held in Washington on April 28, 1926, to consider the subject of compulsory, all-inclusive incorporation of the bar in the different States, for which a movement has been in progress for some time, this Association was represented by three delegates, selected by the President,—Messrs. T. Hovey Gage of Worcester, Frederick W. Mansfield of Boston, and the Secretary. The proposal is little understood in Massachusetts, but it was made the subject of a vigorous discussion recently in New York. Briefly, it may be summarized as a plan for the organization of all members of the bar in each State as members of a state bar association, the membership and the payment of dues being obligatory upon every member of the bar. After reports on the matter from different States, some of which (Alabama and New Mexico) have tried the experiment, and after extended discussion, on motion of William D. Guthrie, Esq., President of the Association of the Bar of the City of New York, the following resolution was adopted by a vote of 47 to 34. The delegates of this Association voted unanimously in support of this resolution.

> "RESOLVED, that this Conference of Bar Association Delegates recommends to the various state and local bar associations throughout the United States that compulsory, all-inclusive incorporation of the bar is a matter that should

primarily and properly be determined by each State, in accordance with its own existing conditions and its own traditions."

Advertising by Banks and Trust Companies.

At the last Annual Meeting the Special Committee on this subject was continued and its recommendations were referred to the Executive Committee. On inquiry by correspondence to the members of the Executive Committee by the Secretary they appear to be divided in their opinion. This fact was communicated to the Committee on Legal Affairs who had the subject under consideration.

The latest draft which the Legislative Committee on Legal Affairs had under consideration was to amend chapter 221 of the General Laws by inserting after section 46 thereof the following new section, 46a:

> "Section 46a. No person shall publicly solicit by advertisements, notices, circulars, radio or otherwise his or its appointment as executor, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator or trustee under a will or other instrument creating a trust. Nothing herein shall prevent a corporation duly authorized to act in such capacities from giving public notice that it is so authorized."

As to the method of enforcement, it has been suggested that the power of enforcement should be given to the Commissioner of Banks to issue orders to "cease and desist" enforceable by the Court and subject to appeal to the Supreme Judicial Court in a manner similar to that provided in the practice before the Federal Trade Commission under U. S. Comp. St. 8836-EE. If such an act were adopted it seems clear that it would govern the practice of national banks as well as local institutions. (See *First National Bank* v. *Union Trust Co.* 244 U. S. 416 at page 426.)

The Legislature took no action in the matter.

Judicial Salaries.

This subject has been a constant matter of discussion before the Legislature and the public for some years. There have been various recommendations for increasing the number of judges on the Superior Court for different reasons; there have been recommendations for increase in salary and recommendations for the restoration of judicial retirement allowances which were done

away with by St. 1920, c. 627, as to future appointees and by a process of election as to previous appointees. The public demand for the more prompt and effective administration of justice which has been especially emphatic in connection with the criminal law, but which also extends to the civil side of the courts, emphasizes these questions.

We believe it to be more important to get the fullest value for the community out of the existing number of judges and to plan to do this in the future than it is to postpone the facing of that problem by simply adding to the present number of justices under existing conditions.

An act to increase salaries of the judges of the United States Court has recently been passed by Congress. We believe that a reasonable increase in the salaries of those of our State Courts in which the judges have to devote their full time is important from the point of view of the public as a business proposition in the interest of the proper administration of justice.

The following new members have been admitted by the Executive Committee during the year:

Gerald J. Callahan, 31 Elm St., Springfield.
Fred W. Fisher, 85 Devonshire St., Boston.
Harry A. Lider, 218 Olympia Bldg., New Bedford.
Bryant Prescott, Masonic Bldg., New Bedford.
Oliver Prescott, Jr., Masonic Bldg., New Bedford.
James C. Reilly, 174 Central St., Lowell.
Archer R. Simpson, 31 Elm St., Springfield.
Arthur Sweeney, Central Bldg., Lawrence.
Charles C. Cabot, 30 State St., Boston.
Hugh J. Campbell, 10 State St., Boston.
Robert William Hill, 70 Washington St., Boston.
Marcien Jenckes, 158 Brattle St., Cambridge.
Herbert Schnare, 30 State St., Boston.
Charles Gaston Smith, Jr., Assistant District Attorney, Court House, Boston.
Eugene T. Connolly, 1 Federal St., Boston.
Franklin T. Hammond, Jr., 55 Congress St., Boston.
Harold Henneberry, 52 Chauncy St., Boston.
John H. Higgins, 235 Audubon Road, Boston.
Robert Hopkins, 55 Congress St., Boston.
Lispenard Pfister, 161 Devonshire St., Boston.
Sumner Y. Wheeler, 17 Pleasant St., Rockport, Mass.

Rudolf P. Berle, 60 State St., Boston.
Haskell Cohn, 60 State St., Boston.
Charles A. Coolidge, Jr., 70 Federal St., Boston.
Fred W. Fisher, 85 Devonshire St., Boston.
Maxwell W. Foster, 30 State St., Boston.
Mary E. Hyde (Mrs.), 386 Durfee St., Fall River.
W. Barton Leach, 84 State St., Boston.
Frank Orfanello, 332 Broadway, So. Boston.
A. Russell Stokes, 30 State St., Boston.
Richard Wait, 30 State St., Boston.

On motion of Mr. Gage of Worcester the report was accepted and placed on file.

THE TREASURER'S REPORT.

TREASURER JOHN W. MASON.—Mr. President and Gentlemen: I have a report starting with a balance from last year in the Mechanics Savings Bank of Worcester of $2493.65 and a balance in the Hampshire County Trust Company of $1287.66. During the year there have been received from dues for the year 1926, $4295; for other years, $115. Also we received interest on the deposit in the Mechanics Savings Bank, $113.44.

I have a detailed list of items of expenses, but I doubt if they interest anybody at the present time. They are largely for publication of the QUARTERLY and some incidental expenses. The important thing is that we have on hand in the Mechanics Savings Bank of Worcester $2607.09 and in the checking account in the Hampshire County Trust Company $960.98.

THE PRESIDENT.—You hear the report. Does anyone desire to ask any questions or seek any further information in reference to it?

The report was accepted.

Report of the Grievance Committee was read by Mr. Forbush, as follows:

REPORT OF COMMITTEE ON GRIEVANCES.

During the past year forty-three complaints have been received and considered. Of these, twenty-seven have been disposed of by the Secretary, five cases have been the subject of hearing before the full committee on January 23, May 14, and December 4, and eleven matters are still pending.

In four of the five cases heard by the committee, disbarment was recommended. One of these matters was subsequently dismissed by the Executive Committee after an adjustment between the parties, and two others have not yet come to the attention of that committee.

In the case of Joseph Lipsitt, who had been convicted of conspiracy to bring intoxicating liquors into the country in violation of the Federal laws and had served out the sentence imposed on him by the United States Court, the Secretary brought a petition for disbarment in the Supreme Judicial Court as instructed by the Executive Committee. The Justice who heard the case found in substance that our petition was properly brought, but that defendant had already suffered enough, and was not, in his opinion, a person unfit to practice law in this Commonwealth. He, therefore, dismissed the petition.

This case, as well as that of Moses Entin, which was dropped a few years ago by the then Attorney General after our complaint had been turned over to him under the practice then in force, are referred to in order to clear the committee of any suspicion of laxness and inefficiency or of holding a low standard of moral fitness for the practice of our great and honorable profession, so far as those instances are concerned at least.

The intelligent and active co-operation of the efficient Secretary and the members of the committee both in attendance at the hearings and in personal investigations of cases under consideration, have shown a most healthy and devoted interest in this public service.

In the death of George R. Blinn the committee lost a most valuable member, faithful in attendance and wise in counsel.

Respectfully submitted,

FRANK M. FORBUSH,
Chairman.

MR. F. W. MANSFIELD.—Did the committee accept the decree dismissing the bill, or are they going to take it up in the Lipsitt case?

MR. FORBUSH.—We have done nothing about it. I don't know whether there is an appeal to the full bench on that or not.

MR. MANSFIELD.—Disbarment is a law matter, I suppose.

MR. FORBUSH.—Yes.

MR. MANSFIELD.—It would probably go up on exceptions. It was a *nisi prius* decision.

MR. FORBUSH.—I don't see what we can do, really. If a judge of the Supreme Court sees fit to dismiss that kind of petition, we can simply say, as we have said in substance, that we think it is a mighty low standard of professional fitness that a man who has sworn to support the constitution and laws of the United States and the Commonwealth of Massachusetts and enters into a conspiracy to violate them, is convicted of it and sentenced, is still a man fit for the practice of this honorable profession. We do not believe it.

MR. FRED L. NORTON.—May I inquire of Mr. Forbush whether the committee has considered whether the case can be taken up with a reasonable chance of prevailing on exceptions, or is it purely a matter of discretion?

MR. FORBUSH.—We have not looked into that at all, Mr. Norton. We have thought for all practical intents and purposes that was the final disposition of it.

MR. MANSFIELD.—Has the twenty days expired?

MR. FORBUSH.—I hardly think so. Of course the petition was brought under the direction of the Executive Committee. Our duties were performed when we had reported a recommendation. The Executive Committee adopted our recommendation and authorized the proceedings, so I suppose the Executive Committee would really be the ones to take the action.

A VOICE.—If any.

MR. R. W. HALE.—Mr. President, having served as the chairman of the Committee on Character for Suffolk County I have had with regard to the proposition of keeping unfit people out of the bar somewhat the same experience that my brother Forbush has had with regard to getting unfit people out of the bar. I hope that this matter will not be allowed to go without some expression of our sympathy with the committee and, if feasible, some protest by this Association. I suggest that, even if it be the most forlorn of forlorn hopes to contend that this decision is one which is appealable, we might nevertheless consider appealing it on account of the public opinion which would be built up, if, on this record, the full bench was prepared to say that this is the kind of thing that is to stand if one of them has said so. It is not limited to the experience of my brother Forbush, I have had the same experience myself with regard to the young men who have got into the

bar. I think something should be done about it; at least, we should in some way express our sympathy with the committee and express the opinion of the bar as backing up the committee. I would be very much interested to know if there is anything the committee would like to have us do, to that effect.

MR. FORBUSH.—Mr. President, I think, possibly, in order to place the whole situation before this body I ought to read the entire opinion as delivered by Mr. Justice Wait, which is dated December 7.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Bristol, ss.

In the matter of Joseph Lipsitt

FINDING AND ORDER

I have been greatly troubled in reaching a decision in this case.

The Massachusetts Bar Association has acted properly in bringing it to the attention of the Court. When an attorney of this Court has been convicted of a conspiracy to defeat any law of the United States, the questions immediately arise whether he possesses the qualifications of character which should be found in one who exercises the high office of an attorney at law in the Courts of Massachusetts, and whether he may properly be allowed to continue in his office.

The answers depend upon the nature of the offence, and the circumstances under which it was committed.

Enquiry has been made by an attorney designated by the Court. I have examined the record and have read the evidence of the trial in the Courts of the United States. I find that the accused was found guilty upon evidence which indicates that he was not a prime mover in the alleged conspiracy and that he was acting in aid of a sister's husband and, apparently, without inducement or profit for himself. Extreme moral obliquity is not established.

If this were all, however, I should feel that discipline to some extent by this Court was called for. It is not all. He has been disciplined. He has paid a fine of $500. and has suffered imprisonment for three months. He has, also, as a result of his prosecution suffered greatly in loss of individual and family property. No accusation is made that he has ever been guilty of deceit, malpractice, or gross misconduct toward any client, or of any offense against the law of Massachusetts.

The jury has found him guilty of an immoral act, but, in the circumstances here present, I do not find him guilty of such gross misconduct that his removal from the bar is required under G. L. c. 221, § 40.

The Massachusetts Bar Association makes no suggestion beyond bringing the matter to the Court's attention. I am not convinced that the respondent is not safely to be trusted henceforth to live up to the high requirements of his oath as an attorney. I am satisfied that further discipline is unnecessary. The proceeding is dismissed.

WILLIAM CUSHING WAIT,

DECEMBER 7, 1926. *J. S. J. C.*

It seemed to us, in justice to the committee, that this matter ought to be brought before you in the form in which I put it, because in this particular instance no reprimand was administered, unless this opinion may be construed to be a reprimand—no suspension from an office of an attorney, no disbarment, but "Proceedings dismissed".

THE SECRETARY.—In answer to Mr. Mansfield's question, I think attention should be called to the fact that under the recent statute (St. 1924, c. 134) the conduct of the proceedings, as soon as the matter is called to the attention of the Court, is entirely in the hands of the Court. The Bar Association is not a party under the decisions of the Court and the Court assigns counsel to conduct the matter. In this case the Court assigned Mr. Raynor M. Gardiner, the Secretary of the Greivance Committee, and he presented the case to the Court.

MR. NORTON.—Who is the petitioner, may I inquire?

THE SECRETARY.—In this particular case Mr. Gardiner was away in the summer and asked me to file a petition. I proceeded somewhat differently from the way in which these matters have generally been presented. I tried to proceed in exact accordance with the language of the Court in the Casey case in the 211th Massachusetts Reports, in which the Court decided that the Bar Association was not a party to such proceedings, nor anyone else; that after the matter was called to the attention of the Court, which might be in the form of a petition or a mere representation, it was an inquiry by the Court, and that anyone connected with bringing the matter before the Court was practically in the position of *amicus curiae*. This matter was, therefore, brought before the Court on a paper which I filed myself, as an individual and as Secretary of the Bar Association, calling attention to the fact that the individual involved was a member of the bar and had practiced in New Bedford; that he had been convicted in the Federal Court, as shown by the certified copy of the record of the Court attached

to the paper, and that in view of these facts an inquiry into his professional conduct was called for and the matter was, therefore, called to the attention of the Court and seemed to warrant disbarment proceedings. It was then submitted to the court in that way.* The Court has construed any request or suggestion in such a document in that same Casey case as a suggestion for such action as the Court may deem fit to take. Accordingly the whole character of such a proceeding under that opinion is that of an inquiry by the Court into the conduct of one of its officers. Under the recent statute that I have already referred to, the Court appoints counsel to conduct the inquiry and present the matter to the Court, and the Court then acts as it sees fit.

MR. MANSFIELD.—The defendant, if Mr. Justice Wait had decided against him, certainly would have had a right to go to the Full Court. Now as long as the sitting judge dismissed the petition, it seems to me that the counsel designated would have the right to take the case to the Full Court, even though he might not get much comfort when he got there. But I think he would have the right to take it there and then possibly the only question before the Court would be whether or not this was a proper exercise of the discretion of the judge sitting in *nisi prius*. But I think there can be no doubt of his right to take the case there.

MR. WILLIAM R. BIGELOW.—Mr. President, I should think that the presiding justice could certainly report that case to the Full Court, but I do not know how pressure could be exerted upon him to do so unless possibly some vote of this Association might influ-

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*COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ss.

In the matter of JOSEPH LIPSITT of New Bedford.

Respectfully represents Frank W. Grinnell as an individual officer of said court and as he is Secretary of the Massachusetts Bar Association that he is informed and believes that Joseph Lipsitt is an attorney at law, having been duly admitted to the bar of Massachusetts and having practised for some years in New Bedford in the County of Bristol, and that he is informed and believes that the said Joseph Lipsitt was one of the defendants in the case of *United States* v. *Joseph Lipsitt and others* indicted, tried, found guilty, and sentenced to pay a fine of five hundred dollars and to be imprisoned in the house of correction for a period of three months as shown by the certified copy of the indictment and the record of the District Court of the United States for the District of Massachusetts in the case of *United States* v. *Joseph Lipsitt and others* hereto annexed.

WHEREFORE the undersigned, Frank W. Grinnell, individually and as secretary as aforesaid respectfully brings this matter to the attention of the court and suggests that the conduct of said Lipsitt as an officer of the court calls for investigation and warrants his removal from the office of attorney in this Commonwealth in the interest of the public welfare, and in connection with the foregoing suggestion respectfully refers to the opinion of this court in the case of *Peter J. Casey*, 211 Mass., pp. 191-193.

FRANK W. GRINNELL.

ence him to take that step. But he certainly, I should suppose, would have the power to report the case for the Full Bench.

THE SECRETARY.—I assume that there is nothing to prevent counsel thus selected by the Court from taking the matter up or in asking for a report as any other counsel. In this case Mr. Gardiner has not thus far acted or undertaken to carry the case up.

MR. MANSFIELD.—Disbarment is a law action, isn't it, Mr. Grinnell? It is not equity?

VOICES.—It is a law action.

THE SECRETARY.—In a sense I take it it is law. I don't know that it comes under the head of an "action".

MR. MANSFIELD.—You would have to save your right, I take it, by exception instead of by appeal.

THE SECRETARY.—I don't remember whether there is any settled practice of that kind, but it certainly is not in the class of an ordinary action at law. It is a matter which the Court may institute on its own motion; it is a matter in which there are no parties except the respondent. As soon as the matter is brought to the attention of the Court everybody drops out as a party except the respondent, the person involved, and the Court can consider the matter in any way it sees fit. I don't know that there is any technical rule which applies to such a proceeding.

MR. DRURY.—Mr. President, would it not seem upon reading Judge Wait's opinion that his feeling is made very plain that he thought that this was an improper and punishable act on the part of Lipsitt, but that he felt under all the circumstances no further punishment was necessary? That being the case, isn't that a matter largely of his discretion, and would not an appeal or report—the latter probably being the proper procedure—probably be unavailing? On the other hand, Justice Wait still has control of the matter, no final decree having been entered, but a memorandum for a final decree merely having been handed down; and if it should be represented to him that his order for a decree "Proceedings dismissed" might create a great public misapprehension as to his real feeling in the matter and it would be much better if he made a final order of censure, would not that be the best way, to have Mr. Gardiner take the matter up with Justice Wait to see if he would not change his order as to the final disposition of the case, leaving his opinion on the actual decision unchanged?

MR. HOLLIS R. BAILEY.—It may interest the meeting to know that this case of Lipsitt whom Judge Wait dealt with on the ques-

tion of disbarment is only one part of an interesting transaction. The vessel in question—I think it was called the "Romance"—was owned one-third by the captain, whose name I forget, and two-thirds by a corporation which was composed of a number of individuals, one of them a man from the Cape Verde Islands who was an applicant for admission to the bar. Six of the people, I think, were indicted in the United States Court for conspiracy. The vessel was captured outside of New Bedford. She had two hundred cases of liquor of some sort, I think whiskey, which was concealed under some salt, and she had several hundred more cases which were not concealed. The captain turned state's evidence and so escaped punishment. The lawyer in New Bedford and three others of the conspirators were found guilty by the jury. Two of the alleged conspirators were discharged by the jury and Mr. ————, the applicant for admission to the bar, was found guilty but the district attorney recommended a smaller sentence and he was fined $100, which I believe he paid. And now Mr. ———— has passed his examination for admission to the bar and filed a petition to be admitted. The Character Committee for Suffolk County has reported against him. The Bar Examiners have had one hearing and the matter is still pending for the district attorney to be heard and the Bar Examiners to consider the matter. So we have quite an interesting situation. Mr. ———— was represented by counsel before us and reputable lawyers came and spoke well of him, and, perhaps, he has been "punished enough". The Bar Examiners have not yet considered his case but are listening with much interest to the sentiment of this meeting on the decision of Judge Wait.

Mr. Drury.—I do not wish to be considered as agreeing with the decision of Judge Wait, but I doubt if we could make the Full Court reverse it. If we could lead him to change his mind in any respect it might be exceedingly helpful.

The Secretary.—I suggest that whatever may be the procedure in the case in which the Court has acted, there is a very distinct difference between admitting a man to the bar and throwing him out, even though it may be a difference of degree.

Mr. Hale.—Mr. President, I move that the report of the committee be accepted and the committee be thanked for the position which they have taken with regard to the standards of the bar. I intend, and I believe every one of us will intend when we vote, that the vote thanking the committee for the position which it has

taken in regard to the standard of conduct at the bar should be construed by the committee as encouragement to do whatever it wants to do. But I would rather not specify what we should do or what it should do.

MR. DRURY.—I venture, Mr. President, to add to the motion of Mr. Hale an amendment to the effect that it be suggested to the committee that they confer with Mr. Gardiner, the counsel, about that particular case. I move that as an amendment.

MR. HALE.—I thank the gentleman for his second to my motion, which this is, and I accept the amendment.

THE PRESIDENT.—Is there anything further to be said upon this?

MR. NORTON.—May the motion be read as amended?

[The motion as amended was read, as follows:

> "That the report of the Committee be accepted and the Committee be thanked for the position which they have taken with regard to the standards of the Bar; and that it be suggested to the Committee that they confer with Mr. Gardiner, the counsel, about the Lipsitt case."]

The motion was carried unanimously.

THE SECRETARY.—Mr. Proctor has sent me the report of the Committee on Judicial Appointments.

REPORT OF COMMITTEE ON JUDICIAL APPOINTMENTS. MASSACHUSETTS BAR ASSOCIATION.

December 15, 1926.

The Committee on Judicial Appointments has considered the vacancies on the bench as they have occurred and have offered to assist the governor with suggestions if he wished to receive them. When requested by the governor, your committee has submitted the names of men whom they believed to be fitted for the position.

Respectfully submitted,

T. W. PROCTOR,
Chairman.

On motion of Mr. Norton the report was accepted and ordered placed on file.

THE SECRETARY.—The Committee on Membership, Mr. President, reports that all the applicants who have been referred to in the Executive Committee's report have been approved by them

during the year and they report the names for admission at this meeting.

I move those applicants be admitted to membership.

The motion was seconded and carried.

ADVERTISING BY BANKS AND TRUST COMPANIES.

MR. PHILIP NICHOLS.—The Special Committee on Advertising by Banks and Trust Companies has not prepared any written report. We had a rather elaborate report last year which set forth our views on the matter,* and a bill was introduced in accordance with that report at the 1926 session of the Legislature. I cannot say that there was very much interest shown in the matter by members of the bar. The hearing held was rather slimly attended and the committee reported against the proposed limitation on advertising by trust companies. The committee is still of opinion, as it was at the time of the last meeting, that such advertising had its harmful features that should be limited. But, unless more interest is shown by the members of the bar generally, the committee feels that it would be useless to attempt to continue the effort to limit the advertising by legislation.

MR. BAILEY.—May I ask the gentleman a question? It is true, is it not, that in New York they have rather a good statute on this subject?

MR. NICHOLS.—I am not familiar with the New York statute.

MR. BAILEY.—I have been over there and heard it discussed in New York, and I think they have a rather careful statute limiting the advertising of trust companies and banks to do legal business.

MR. DRURY.—I would suggest that if the committee were to notify members of the bar like Brother Bailey who might be interested of the date of the hearing before the committee of the Legislature, there would be a better chance of having interest shown by members of the bar. Members cannot be expected to show interest in hearings they do not know of and have not heard about.

THE SECRETARY.—Mr. President, I should explain that the Association has never taken any action in support of the legislation. The members of the Executive Committee have disagreed on the subject. A majority two years ago did, at the request of the Committee on Legal Affairs, express an opinion in regard to the

* See MASSACHUSETTS LAW QUARTERLY for ....., 1926, pp. .....

matters then pending before the Legislature.* The Executive Committee has never been unanimous and the Association has never taken any action on the matter except to discuss it and appoint the committee. At the hearings to which Mr. Nichols has referred the situation was stated to the committee just as it was, with the suggestions which had been made, the votes of the majority, the views of the minority of the committee. That explains the reason why no general campaign has been undertaken. The Association has never directed any such campaign.

MR. DRURY.—Isn't it a fact that a majority of the Executive Committee have been in favor of the legislation.

THE SECRETARY.—It was two years ago, but they have never expressed themselves anywhere near unanimously, and in submitting such a vote to the legislative committees I have always explained it exactly as it was, with the disagreements.

THE PRESIDENT.—Anything further to be said?

MR. HERBERT PARKER.—I understand that the committee to whom was intrusted an examination upon this pending subject has made verbal report this morning through its chairman, the effect and purport of which as I understand it is to disclose an evident lack of interest, or at least initiative, propellant interest, in this proposed legislation. With that lack of interest I am entirely in sympathy. Indeed, I am in active opposition to the Association or those representing the bar seeking any such protective or limiting legislation as is here proposed. I take the report made verbally by the chairman of that committee to indicate that the committee considers that its labors have been completed and that, so far as they see, there is no occasion to proceed further with the matter. I move that that verbal report be accepted and the committee be discharged. [After a pause.] It is suggested by a better parliamentarian than I am that the proper motion would be that the report be accepted and placed on file. How you can place on file a verbal report I do not know, but our Secretary can accomplish anything.

THE PRESIDENT.—Anything to be said upon the motion of Mr. Parker? Are you ready for the question?

The motion of Mr. Parker was carried unanimously.

THE SECRETARY.—Those are all the reports I have, Mr. President, except the report of the Committee on Nominations of which Mr. Parker is chairman.

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* See MASSACHUSETTS LAW QUARTERLY for February, 1925, pp. 35-36.

REPORT OF THE NOMINATING COMMITTEE

This report was read as circulated in print with the notice of the meeting showing the nominations for the offices of President, Vice-Presidents, Secretary, Treasurer and Executive Committee.

THE SECRETARY.—I would add, Mr. President, that the Secretary has had no other nominations handed to him under the by-law.

A ballot was then taken and the persons nominated were unanimously elected. [*The list is printed at the beginning of this number.*]

THE PRESIDENT.—The regular business has been gone through with. Is there any other matter before taking up the report of the Judicial Council?

MR. HOLLIS R. BAILEY.—I would like to make a motion to be referred to the Executive Committee, that the Executive Committee consider whether out of the income of the Association already on hand and coming they might support one, possibly two, scholarships for students in some existing law school. That is done by different bar associations. I think the Harvard Club of Boston supports a number of scholarships in the college and it seems to me a good use of the income. We are all interested in legal education and having men well educated come to the bar. I just make that for the consideration of the Executive Committee.

THE PRESIDENT.—Does any member care to move any action with reference to it, or will the matter proceed of its own motion?

MR. HERBERT PARKER.—Mr. President, if the motion is merely to submit to the Executive Committee the consideration of that proposition, I should not interpose any objection. Action by the Association of the character suggested, I think, opens questions of very serious import and I should doubt very much whether it was within the jurisdiction of our Association to enter upon that service, however laudable the end to be attained may be. I should doubt very much whether it were wise, and the establishment of scholarships in different institutions might be a matter of perplexity and embarrassment at some time. It seems to me that such action is not within the defined or even expanded scope of the powers of this Association. We have enough to do with those who are lawyers, not to raise up those who are yet to be through divergent courses.

No action was taken on the motion.

THE SECRETARY.—As the next matter is the report of the Judicial Council which it was stated in the notice was coming up at

this meeting to enable the members of the Association to discuss it, and at the meeting last year before the discussion had gone far, someone asked me to state, in outline, the substance of the report for the benefit of those who had not had an opportunity to read it, I think it may save time and, perhaps, some misunderstanding of some of the discussion, if I go through it briefly now before you begin to talk about it. If that is desired I will endeavor to state it briefly.

[The Secretary then stated the recommendations in the report.]

THE PRESIDENT.—The matter is before you for discussion, brethren, or for questions.

MR. DRURY.—Mr. President, it is obviously so late that there is no opportunity to discuss this report in detail and I wonder how far the members of the Association desire to commit themselves in the absence of discussion. I wonder if it would not be feasible to pass a vote that we sympathize with this report in the main and that we refer it to the Committee on Legislation with full power and with the recommendation that the Committee support before the General Court such parts of the report as, after study, it decides to give its full approval.

A MEMBER.—Second the motion.

MR. DANIEL F. O'CONNELL.—Mr. President, do I understand Mr. Drury's motion to be an endorsement by this meeting of the report as submitted by the Council?

THE PRESIDENT.—I understood him to say "sympathize in general".

MR. DRURY.—Sympathize in general and refer the matter to the Committee on Legislation.

MR. O'CONNELL.—The word "sympathy" is of course rather broad. There are at least three sections of that report in reference to specific recommendations that I should like to be heard on in respect to a dissenting opinion. But if this is to be referred to the Committee on Legislation, that provides an opportunity—

MR. DRURY.—I am also opposed to certain portions.

MR. O'CONNELL.—I do not mean to be understood as objecting to the full report, but to the endorsement of all the recommendations.

MR. HOLLIS R. BAILEY.—I hope there will not be any vote approving the action of the Council on the matter of declaratory judgment without discussion. Brother Grinnell states one view of it, but he only states a very small view.

THE PRESIDENT.—You have heard Mr. Drury's motion.

THE SECRETARY.—Mr. President, may I say a word?

THE PRESIDENT.—Yes.

THE SECRETARY.—This subject was slated for discussion and I am extremely sorry that I took up so much time in stating what there was to discuss. But I, certainly on the part of the Council, do not want any sweeping vote of commendation of all these recommendations. I think if the members have any suggestions to make in regard to any one, personally I should be very glad to hear them as a member of the Council and I know Mr. Mansfield and every other member would be glad to hear them. We want discussion, we want suggestions; we want things picked to pieces, as well as supported, by anybody who feels that way. We accept Mr. Drury's sympathy and that of all of you, and, perhaps, we need it; I don't know. I don't believe there is opportunity to discuss the details as we hoped there would be.

MR. DRURY.—Of course my idea—if I have not expressed it rightly, that can be corrected—my idea was to sympathize in general and reserve all our rights as to particular matters.

THE SECRETARY.—I so understood it. I should so interpret it even if you didn't mean it.

MR. O'CONNELL.—Mr. President, may I make this suggestion, —that the Committee on Legislation, when the subject matter of these recommendations comes before that Committee for attention, send out in advance a notice to the members of the Association notifying them to appear before that Committee in order that the discussion that Mr. Grinnell said was hoped for might be had. Otherwise some of us who are interested in some recommendation or group of them might not know at what date they would be considered by the Committee on Legislation.

MR. FORBUSH.—I think a further suggestion in the line of what Mr. O'Connell has said might be offered. The report is long, the recommendations are many. Some of us approve some of them and do not approve some of them. If the committee, whatever its title is, is to consider the matter, would it not be a good idea that they set one or more hearings at which the members of the Association might appear and express their views and have time for discussion, taking up special matters, unless they are all taken up at one hearing.

THE PRESIDENT.—Is there anything further to be said? If not,

you have heard the motion of Mr. Drury. [The question was put.] It is a unanimous vote.

Any further matter, gentlemen, to come before the meeting?

THE SECRETARY.—Unless there is something more I move we adjourn to lunch.

The motion was seconded and carried and the meeting was thereupon, at 1.10 p. m., declared adjourned.

FRANK W. GRINNELL,
Secretary.

ADDRESSES AFTER THE LUNCHEON.

OPENING REMARKS BY PRESIDENT ARTHUR J. YOUNG OF THE WORCESTER COUNTY BAR ASSOCIATION.

This meeting is primarily the meeting of the Massachusetts Bar Association and this luncheon at which I have the pleasure of presiding a very few minutes is simply an interlude in the meeting of that Association. In behalf of the Worcester County Bar Association I want to express the pleasure we feel in having the State Association meet here today and honoring us by accepting our invitation for lunch and taking the time which they have given us to give us this pleasure.

We have a Bar Association here of which we are justly proud. The traditions of the bar are high and I think today, although I judge largely by tradition, the standards of the Worcester Bar are as high as they ever were and I think the work of the County Bar Association and the State Bar Association furnishes a great opportunity for service to the bar, to the courts, to the community in which we live and to the State.

As I have said, we take pride in our Bar Association. We take pride in the judges who have been elevated from this Association, many of whom are with us today. We take pride in the President of the Massachusetts Bar Association who has just been elected, and I think we feel the honor that has been conferred upon our local association by selecting one of our number as President of the State Association. In behalf of the Worcester County Bar Association I simply extend greetings to the members of the State Bar Association and will now introduce the man who needs no introduction to most of the members of the Worcester County Bar Association—Hon. Franklin G. Fessenden of Greenfield, the retiring President of the Massachusetts Bar Association.

REMARKS OF HON. FRANKLIN G. FESSENDEN.

I want to say a word that comes to me, after hearing what Mr. Young has said. I think the training one gets in the Worcester County Bar is not exceeded by what he gets anywhere, not only in practice, not only in trials, but in that long continued line of high principle that follows him in all his practice in court and in office.

I was born in Worcester County, practiced in Worcester County, and have still a great affection for it. But I went into another county, where I think they try to keep up the same traditions that have been kept by you. So there is a feeling of pride in me that I practiced here in this county.

There is a something in the air today. It is indescribable. Who can tell what the trouble is today? There is trouble enough, they say. Some persons and some of the papers say the courts are wrong, the judges are wrong, the juries are wrong, prosecuting officers are wrong, almost everything is wrong.

In my opinion there is not anything like the amount of trouble that people say there is. It is small compared with what it is depicted as being. In the first place, if you talk with persons who are finding fault and criticising what is being done, very soon you are unable to learn whether they are criticising the fundamental principles or whether they are criticising the procedure. If you ask the question, you find that there are very few who say in the end that they are criticising the fundamentals, the underlying principles of law, the rules of the law. But when you come to the question of practice and procedure, there is much said then. "It is wrong. Why doesn't such a court do so-and-so? Why doesn't such a jury decide in such a way?" They say, "Delays! There shouldn't be such delays. Judges are responsible for them, They permit the cases to be delayed."

Is it a matter of procedure, or is it a matter of defense, real defense, we will say, in a criminal case? A person is accused of having committed some offense. He says, "I did it in self-defense," and he has a trial before a jury. Perhaps the jury will believe him and perhaps they will not. But people who are complaining say, "What is self-defense? To what does it apply? We are not lawyers, we don't know about that; we say the proceeding isn't going right. The machine isn't working; the practice is wrong; it is going badly."

You begin again. You are patient. What are the particular wrongs?

Those who are making the criticisms criticise not only the way the judicial machine works, but also the persons, even though honest and of the strictest integrity, who are administering the law.

Our ancestors were pretty shrewd in many respects, I think we all agree. They thought they knew and perhaps they did know —what was meant by self-defense.

I remember when I was a young boy talking with an old man whose father was out on the Green in Lexington at the fight, with his old Queen Anne arm, and he told me his own recollections of that day. He was a little fellow at that time. His mother, when the British marched by the house, took him and ran and hid in the swamp from the troops. But he told me that after the fight was over, the people began to make affidavits and depositions—Hudson in his History of Lexington tells of it. It made a great impression on me as a boy. I had to wait until I grew up before I knew what an affidavit was or its use. But Hudson says they wanted to prove they did not begin the war. These men who participated in that fight made these various affidavits and they said the British fired first. Those affidavits were taken and many are still existing, and this man told me that although it was said that it was all right to prove that they did not begin the war, yet some of them thought that they were justified in self-defense,—there was the element of self-defense entering into it—the British fired first and, therefore, they had a right to defend themselves. That interested me. He said that his father didn't take any stock in that. His father was out on the Green. His father said,—this was in 1775,—his father said he didn't believe they could gain by that, because it was real treason, after all. He couldn't see how that would answer, but some of them thought it would.

Perhaps some of the criticisms that are made on some of the procedure today might be compared with that. Our ancestors were not only skilful sometimes, but they were rather adroit. Any one of you (lawyers) will say that it took an active mind to make out self-defense on such an occasion as that. But I have never heard them criticised—have you—for what they did out there that day?

Mr. WILLIAM H. BROOKS.—Not except in England.

JUDGE FESSENDEN.—The voice did not come over the sea as quickly as it does today. As I grew older that was on my mind and I know it kept on it even after I had the honor of being where some of my friends here are today. I was holding court in Worcester quite a number of years ago and I saw some of those affidavits

here. You have them here in Worcester. I looked at them and there they were, just as this old man had told me. There are some in Lexington, there are some in other places, but I saw those I speak of here. Whenever I think of them there comes to me the remembrance of that man who was out there—a young man he was then—who said, "It is treason, I know it, and I will stand by it." I cannot forget that and there came to my mind some of those men who thought it would be self-defense.

Why do I speak of this? Because I think a great deal of this criticism that is made is wrong. There are delays in practice, there are delays in trials, there are delays from beginning, sometimes, to the end of a suit. Whose fault is it? Will you say it is the judges'? Will you say that judges do not get along as fast with their cases now as they did 50 years ago? Compare the number of cases that they have with the number of cases that the judges 50 years ago had. Where is the trouble? And there is trouble to a certain extent, and we are all more or less to blame.

Let me give you an instance. Why is it that in some criminal cases there is such a constant delay? Technicalities? Yes, and some good questions, some honest questions. What should we do about it? Should we pass laws making it easier to get a little more delay, or shall we come out and say, "Let us stop unnecessary delay?" It is for you, brethren; it is for you to say which you prefer. The voice is with you and the power is with you. If you will assert yourselves such things will not happen. You are having and, unless you act, will have such instances as this: an endless series of motions for new trials, and law questions raised on those.

That was a thing which ten years ago was rare. Now there are many of them, one after another—in the same case, I mean. A law was passed some six years ago that in a capital case a motion for a new trial might be made any time before sentence. I presume you are familiar with that. So long as there are lawyers, and so long as there are lawyers that are gifted, as there are and always will be, they will, as will be their lawful right, take advantage of this law which provides that any time before sentence a motion for a new trial may be made. Many lawyers have resources, as it is sometimes termed. Let us consider a moment. A defendant in a capital case is not sentenced until the case is ready for sentence. A capital case is not ready for sentence until all matters are disposed of. The consequence is this: a motion for a new trial is made; it is argued before the Court, overruled, goes to the Supreme Court, overruled

again, motion is made for sentence and before the sentence is imposed another motion for a new trial is filed.

Do you want to pass more laws? You can bring it about in any case so that it will be nothing but a series of motions for new trials, law questions—and in recent legislation they have recognized the right—they have not created it, but they have recognized the right to raise law questions on motions for new trial. In the early days—I do not think there are any here who date back as far as I do; but in those days a law question on a motion for a new trial was rare to say the least, whether it was based on newly discovered evidence or the weight of the evidence. Now it is not uncommon.

Is it the fault of the judges of the Superior Court or the judges of the Supreme Court? Are they to blame for that? And yet they are the ones to whom it is easiest to point and say, "The judges are to blame for this."

I cannot help mentioning these things, because I know you think of them, and I know if there is anything on which our living as we do and our safety depend, it is these judges who sit in our courts. Without them we should be helpless.

What shall we do for them? Shall we attack them, assail them, or shall we say—which is the fact—"You are overburdened as it is now. We will try to help you carry these burdens. We will not impose additional and unnecessary burdens."

I will say a word about our Supreme Court. I remember a good many years ago when they thought the Supreme Court was taxed beyond its endurance. I think of the situation as it was then and I consider the situation as it is now, and I cannot help believing that our present judges are deserving highly of us in what they are doing for us. What shall we do for them, again let me say. Shall we permit unimportant cases to be taken to the Supreme Court, as can be done now?

We are approaching the point which was being approached some years ago with respect to the United States Supreme Court. They saved themselves, or Congress saved them. Are we going to continue to load our Supreme Court? They cannot endure what will be placed upon them if we go on increasing their load. May we not take a lesson from what has happened in Washington?

Some years ago it was a question, a very serious question, whether the United States Supreme Court could accomplish its work —whether it would not be necessary to enlarge greatly that Court by increasing the number of judges. A way was found to help the

Court. Can we not find a way of helping our Supreme Court if the burden becomes too heavy? The way they found of relieving the United States Supreme Court was by providing that no case should be carried to that Court except by writ if error or by certiorari, to be granted by them. Since that law was passed the people have been able to get hearings before the United States Supreme Court in cases worthy of being heard. Can we not help our Supreme Court? I was brought up with, and I still have, a deep respect for the Supreme Court, and I have a feeling that without it we could not be properly protected in our rights of life and propery. Can we not do something, not to increase the burden, but while leaving the responsibility as great as ever, relieve them from this burden of unimportant questions. I think it can be done. I know it will be one of the greatest satisfactions of your professional life to do what you can do to help out that great cause of the due and faithful administration of justice.

Remarks of President-elect Vaughan.

Brethren of the bar, local and others: It is needless, and yet it is my heartfelt feeling and privilege, to thank you most sincerely for the honor you have conferred upon the Worcester Bar and through it upon myself. I shall not hope to fill the place in as distinguished a manner and with the ability which my immediate predecessor and his predecessors have exhibited.

I would say little more. I am lately convinced that lawyers talk altogether too much—in court, at least, and possibly out of court as well. I am saying nothing about judges. I am saying what I have said to some of them recently that as long as I was about to retire from the active stage which I have hitherto occupied in the forum, I hoped the day was not far hence when the arguments would be cut in two at least, and I thought that then this complaint that we hear about delay would disappear very soon, because there would be such a saving of time.

Of course against that we have the precedent of the case just tried in Washington in which, if the evidence had been taken in Worcester County, our less able—I will not say that—our less distinguished lawyers would have presented the case to a jury in an hour on each side and hit all the necessary spots, while it took the most distinguished men in the country six hours for each side. So I am not going to argue at once to have the time for argument

cut in two, that precedent having started at Washington and reached the country over.

Of course I know nothing about the duties of my office. I am assuming to start with that they do not require me to talk too much, and the proper place for me to show that I appreciate the duty of the office in that respect is right here.

Of course we have a lot of agitation going on, too much with too little cause. The cause of that is principally misapprehension. I expect that innocent lawyers are going to be criticised, condemned,—and possibly we can leave off the prefix and say damned, —continually. I do think, however, that we have it, as Judge Fessenden has said, somewhat within our control if we get about it to put a stop to the most virulent part of the criticism and by proper suggestion to teach some respect to the people who come before the courts.

Our great difficulty here, in my opinion, is one which never did and never can exist in England. Our liberty here has become too much license. Our free speech has become altogether too much vituperation. The State, our society and our country rest as they have and will continue to rest first upon the lawyers. And that brings to my mind the suggestion made by Judge Fessenden of the past, particularly of this bar. I hark back to the time when I first came here, when two masterly men, leaders of the State bar as well as of our local bar, Frank P. Goulding and Colonel W. S. B. Hopkins, handed down to us, the younger men then, a proper regard and admiration and respect for the profession as a profession. Their example we saw every day. There was not then the criticism of the lawyers that there is today. The number belonging to the Worcester County Bar was comparatively few. I must not omit either the names of Francis A. Gaskill, John Hopkins and many others. And we—and the Chief Justice will bear with me in the modest statement—had a constant example of the highest ideals of the professions constantly before us in court, out of court, in the community, wherever they were. Let us try to emulate their career. Let us still continue to have a respect for the profession and for the men of high types and high ideals who have adorned it. And that being so, our progress is sure as the future is sure to come.

Again I thank you for the honor which I feel that I do not deserve alone but share with the Worcester County Bar. I shall endeavor to discharge the duties to the best of my ability and hope that you will not regret your action of today.

On motion of Mr. Forbush a unanimous vote of thanks was passed to the Worcester County Bar Association for their hospitality.

In introducing Mr. Albert Farnsworth, President Vaughan said:

"The subject of the address that we are to hear is one that will interest the members of the Worcester County Bar and of the Massachusetts Bar and every other bar. It has to do with the ancient time when one Shays, who lived in Prescott, Hampshire County,—my father's native town and where he lies in dust—conceived the idea that he would defy the court and take possession of the courthouses, because a man could be imprisoned for debt and for taxes, which was going altogether too far, he thought, and trespassing upon personal liberty that we hear so much about. Mr. Farnsworth is thoroughly posted upon that matter, having studied carefully Shays's Rebellion.

SHAYS'S REBELLION.

ADDRESS BY MR. ALBERT FARNSWORTH OF WORCESTER ACADEMY.

Mr. President and Gentlemen:

I feel somewhat at home in an assembly of this kind, because when I graduated from college I had intended to study law but found myself short of funds. Since, however, I have seen the last cartoon in this green pamphlet where the lawyers are about to enter upon their last circuit (Hell) I am not so sure but that I did wisely in taking George Bernard Shaw's advice when he said, "Those who can, do, and those who can't, teach."

In addressing you on Shays's Rebellion I shall deal primarily with those events of it which occurred in Worcester County. This I think, will interest you because it is the only rebellion, in the history of this country, which had for one of its main objects the abolishment of the legal profession and the courts.

Shays's Rebellion, some of you may recall, occurred about 140 years ago, in 1786. Its center was in Worcester and Hampshire Counties, although two-thirds of the State at that time was under the control of the rebels. The rebellion itself was simply a flaring symbol of the discontent in each of our New England States. There were other minor and local disturbances in each of those states, and if Shays and his followers had been successful it seems to me, as I study this rebellion, the Federal Constitutional Convention prob-

ably would not have been held in the summer of 1787 and the whole course of American history might have been transformed. And so when the Constitutional Convention met in Philadelphia we see the mark of the rebellion in the fundamental law of our land. In the preamble it states:

"We, the people of the United States, in order to form a more perfect union, . . . insure domestic tranquility," etc., and here you see the abiding mark of Shays's Rebellion. Furthermore, you recall that Massachusetts was the sixth state to adopt the Constitution. It was the pivotal state, and if Massachusetts had not adopted the Constitution in 1788 it is probable that the other states would not have done so and the Constitution would not have been ratified.

That, then, was Shays's Rebellion in its broader outlines and its significance upon our Constitutional history. As I develop it I shall talk briefly on conditions in Worcester County as they were in those days, in order to give you an outline of the lives of the people and the terrible situation in which the farmers found themselves and then briefly develop the causes, and finally, dwell upon the military events of the rebellion.

I take Worcester County for a description but what I say of Worcester County applies primarily to all sections of the state. The conditions were the same, although perhaps the physical features of some of our counties are not just what they are in the western part of Massachusetts.

On the eve of Shays's Rebellion Worcester County presented a far different aspect from what it does today. To be sure, the physical features are much the same now as they were then and Mount Wachusett still towers above the hills where John Eliot preached to the savages. But everything else has changed. The great forests of pine which at that time covered the whole countryside have been cut down and great factories now cover the fields which were then a feeding ground of wild pigeons and turkeys. And if some of our worthies of those days whose names some of you remember—Timothy Bigelow, our greatest soldier; John Sprague, our greatest lawyer, perhaps, if we except Levi Lincoln and Dwight Foster of Brookfield—if they were to return, they would think themselves in a foreign land. The county itself in those days had a population of only 47,000; now it has half a million. It has grown from forty-one towns to sixty-five towns. Worcester was in those days only the third largest town in the county, with a population

of less than 1500. In those small towns social distinctions were drawn to a degree that would not be tolerated at the present time. The members of the class in which were the lawyers, the doctors, the clergymen, and the important merchants were called "gentlemen"; the remainder of the population was designated as simply "John" or "Sam". As we run through the state, and this county in particular—and I mention these names because they were the ones who so resolutely opposed Shays's Rebellion—there were the Salisburys, the Lincolns and the Chandlers in this town. The Doors and Pennimans in Mendon and the Wards in Shrewsbury—and I might go indefinitely with the list if that squirearachy or petty aristocracy who were the bulwark against Shays's followers when the rebellion broke out.

I want to call your attention to the difficulty of suppressing a rebellion in those days because of difficulty of transportation. Remember that it took two days to go from Worcester to Boston, and nearly a week to transport goods between these two towns. When General Lincoln made his march from Camp Roxbury to Worcester and Springfield to crush the rebellion, it took him over a week. So that transportation was as primitive as in the days of Moses and one can be assured it was far less comfortable than in the days of the Caesars.

Let us reconstruct the daily program of a county farmer, using for illustration one Elias Staples of Brookfield, a farmer on a small scale. He arose at daybreak and after a simple meal of bread and milk fed his stock, and then repaired to his fields to plow, plant or harvest as the season demanded. At nine o'clock a luncheon called "a baiting" was eaten in the fields. At twelve o'clock the horn sounded for dinner of boiled salt pork, beef, and vegetables, with Indian pudding for dessert. Only half an hour was spent for dinner and about four o'clock another luncheon of bread and cheese was eaten. Supper was served at dusk. During the fall he spent his time mending tools, building and repairing fences and stone walls. There are in this county today hundreds of miles of stone walls, many of which are now covered with wild grapevines and thorny rose, mute testimony of the arduous toil of generations of Worcester County farmers. The long winter was a time of special labor. The boy or man who could swing an axe was busy cutting wood, ruling with "haw and gee" the docile oxen, as the winter's supply of wood was piled in a huge mound in the yard. The wood was then cut into back logs, fore sticks, light wood, kindlings and

chips. Drift roads had to be broken, prime loads of wood delivered to the minister's house, fences repaired and made "horse high, bull proof, and pig tight"; hickory and ash must be fashioned into sled stakes, axe helves, and handles for hoes. On butchering days meat had to be salted, ham cured, sausage and head cheese made and tripe pickled.

The houses which were scattered through the country were few and far between. We have a few of them left. In this town there is the Salisbury mansion. There was the great mansion of Moses Gill in Princeton, who was one of the justices of the court, which was surrounded by three thousand acres of fine timber and meadow land. The furnishings, of course, were very meagre. Most of the farm houses in those days had sanded floors. There was no paper on the wall. The kitchen utensils were for the most part made of wood.

Now, let me jump from this meagre description to the social centres of the time, the church, the tavern, and the village stores. I will dwell especially on the village stores because the economic influence and power of these village stores, it seems to me, had a good deal to do in bringing Shays's Rebellion to its head.

There were in this county at that time about sixty-nine churches, fifty-nine of which were Congregational. There were six or seven Baptist Churches and only, I think, two of the Friends' denomination. There were no Roman Catholic and no Methodist Churches. No Episcopal Churches appeared in the county, or in this section of the state, for a great many years after. The only intellectual treat which the Worcester County farmer enjoyed, outside of reading Isaiah Thomas's paper, the "Massachusetts Spy," and, perhaps, for a short time each week, Bickerstaff's Almanac, was the sermon which he heard the minister preach, sometimes two hours in length, and then, on top of that, a prayer of about an hour.

Then there were scattered through the county—and I mention it because it was in these places, in these taverns, that Shays and his men congregated—there were in each town a considerable number of taverns. In this town was Patch's Tavern or The "United States Arms" and the "Sun Tavern"; but perhaps the most famous one in this section of the state was Uncle Tim's, as it was called, a famous hotel in Ashburnham, which was known all the way from Canada to Boston. These taverns took the place of our clubs today. Here the farmer on his visit to town gambled a little, smoked a good deal, drank a great deal more—drinking, of course, that

famous drink of the day, flip, made of sweetened rum into which the hot "flip-dog" was thrust, giving a burnt and bitter flavor.

Then there were throughout the county the village stores, which exercised an enormous economic influence on the lives of the farmers. There was in this town the Salisbury Store located at Lincoln Square. There was one kept by Abraham Lincoln and the store of Clark Chandler, the famous Tory, and the store of Elijah Dix, the famous physician. So I might go on through all the counties, calling your attention to the important merchants.

Now these storekeepers were very canny men. There are in the collections of the American Antiquarian Society, many letters of the people of this town and as I ran through the letters I find Samuel Salisbury of Boston writing to Stephen Salisbury in Worcester that he had shipped to him a hogshead of wine or liquor of some kind, but to be very careful, that as the proof was very high it would do with considerable diluting. And then I took occasion to run through the accounts of our Worcester County farmers in those days, hundreds of them, thousands of them, and if you read them through you will fancy that each and every one of them was engaged in the bootlegging business, so great was the consumption of liquor. I will not tell you the gentleman's name, but he was a very famous character of this town, in his day and I will just run through the consumption of liquor in the month of October, 1786.

On October 2, two quarts of rum; on the 4th, a quart of Madeira wine; on the 7th, three quarts of rum; and so it went on day after day through the month; month after month; year after year,—not only of this man but of many other of our county farmers.

So much for the general aspect of the county. Let us now examine for a moment the poverty of the farmers in those days.

I went to Boston and spent a good deal of time in studying the valuation lists of Worcester County and of our counties farther west, finding out how much property; barns and houses, cattle, oxen, neat cattle and swine, was possessed by each farmer before the Revolution. And then I took those same towns and did the same after the Revolution, just before Shays entered on his career of rebellion. Without going into the details I found that the amount of property possessed by the average farmer was far less in 1786 than it was in the beginning of the Revolution in 1775. The average size of farm was not more than 70 acres, although some of the men in this town—for example, Nathaniel Patch, had a farm of

about 550 acres; but the average size was about 70 acres and not more than seven of those acres could be cultivated. Each farmer on the average possessed only one horse, one or two cows, a few neat cattle and a few swine. Out of his meagre income in prosperous times he had to support a family ranging anywhere from four to a dozen. In the times of stress and strain which followed the American Revolution his income, of course, was totally inadequate to meet his expenses. The result was that because of the general poverty of this part of the state, the jails were crowded with debtors. Only the other day I was reading that in Albany as late as 1830, twenty-three then were in jail for debts ranging from 6 cents to 90 cents. In our County Jail here, down near Lincoln Square, in 1784, there were 96 inmates, of whom eighty were in jail for debt. You see how harsh, I was going to say almost barbarous, were the laws for debt in those days. Then I recall to your mind that Timothy Bigelow, the most famous soldier of this county in the Revolution, died in jail where he had spent his declining years because of a small debt which he was unable to pay. A mortgage on his farm had run out when he came home from the war and being unable to meet his obligations he borrowed from the Salisburys and other people, and as he could not pay his debts finally went to jail.

Not only were there men of that stamp but there were schoolteachers; and farmers whose property had been extremely large before the Revolution, confined in jail. That was true of Middlesex County; and it was true of the counties of Hampshire and Berkshire.

Now I will tell you what, to my mind, were the causes of Shays's Rebellion. This rebellion was not a sudden or unexpected event. It had been gathering for about five years. The farmers themselves, individually in town meetings, or in County conventions, using the same machinery which had been employed to bring on the Revolution, had protested to the General Court at Boston of the almost intolerable conditions under which they were living. But the Court took no notice of them until the actual rebellion broke out.

These grievances we may divide into three classes. There were those which the General Court could have remedied. There were those which could not have been remedied without a Constitutional amendment,—and the Constitution of Massachusetts in those days, the one that had been adopted in 1780, provided no method for amendment. And then there were those which involved the relationship of the State to the Confederation. Among the

grievances, they complained of was the sitting of the General Court in Boston; they complained of the Courts, particularly of the Courts of General Sessions and Common Pleas; they complained of the scarcity of cash, and so on. Their indictment of the Social and Judicial System numbered about 50, but I have not time to read them all.

The causes themselves, it seems to me, were, in the first place, the extreme poverty of the country. I do not think that any modern community would stand a situation of that kind more than three months. But those men endured it for several years before they broke out into actual rebellion. Their poverty, of course, was caused by the long war in which the Colonies had been engaged. It was caused in the second place by the breakdown in commerce. Before the war Massachusetts had exported millions of feet of timber each year. After the war that industry had been entirely destroyed. What was true of the lumber industry was true of the whaling industry. For example, Nantucket sent out before the Revolution 152 vessels each year engaged in whaling, after the Revolution, only ten or eleven. The same was true of the mackerel and cod fishing, and of the inland fisheries. They were almost entirely destroyed, so much so that the people from Cape Cod left their towns, and many of them settled here in Worcester County. Some of them settled over in Holden, some of them came to Worcester, some of them went still further west, because of the destruction of that industry.

And then, of course, the long war had entailed a tremendous burden of taxation. Before the war Massachusetts had no debt. After the war she was in debt about a million and a half dollars, and owed to the Government under the Articles of Confederation about the same amount. The state per capita tax was about $13.50, or more than it is at the present time. Mind you, I am not talking about the local or county taxes, but the state tax—and levied on a community which was a hundredfold less able to bear it than our communities today. Not having had any experience in handling large debts, the State Government at Boston made the mistake of trying to pay it off too quickly, so that it made an additional burden. James Bowdoin, for example, who was Governor at that time, in his message of 1785-86, wanted to pay off a third of that debt in one year instead of paying it off gradually through the succeeding years. That made a terrible burden for each man, woman and child. And then, because the Legislature was controlled in large

measure by property holders—and you recall in those days that not one out of 16 could vote, that the Governor of this state had to have a large property qualification and the qualification for voting was quite large, so that the result was that not one out of sixteen could vote and those property owners, controlling the Legislature, so shifted the incidence of taxation that it fell upon the polls, and falling on the polls rather than on general property, it hit the farmer in the western part of the state particularly hard.

The distress caused by the destruction of the foreign trade, the staggering load of taxation, and the rapid amortization of the debt was rendered acute by the extreme scarcity of cash. The Colonists had always been accustomed to a mosaic currency of doubloons, pistoles, English and French crowns and English guineas and Spanish dollars and now paper money was added to the confusion of coins. To meet the expenses of the Revolution the Continental Congress had issued large amounts of paper money, about $450,000,000 in all. In January, 1781, the ratio of specie to paper money was 17,000 to 100, that is, paper money was worthless. The inflated currency caused prices to soar and rendered business transactions uncertain. As early as 1779 attempts were made to remedy the evils of inflated currency. On the request of the inhabitants of Boston a state convention was held at Concord July 1, 1779, "to take into consideration the present distressed situation of the people at large, and especially the excessive high prices of every article of consumption and by tracing their causes these evils to discover and point out the safest and best remedies." One hundred and seventy-four delegates were present from all parts of the state, thirty-four being present from Worcester County. This convention fixed the highest price for which twenty-four of the leading articles of produce were to be sold in the seaports. Its resolves having failed of effect, a new convention was held at Concord on October 14, 1779, and attempted price fixing on a large scale. Economic laws are inexorable and the attempt to regulate prices failed. The scarcity of money was proclaimed throughout every medium. The instructions of the town meetings to representatives in the Legislature, the petitions of the County Conventions are in the same vein, the diaries and correspondence of the period lament a lack of a circulating medium until finally the Legislature was forced to take formal notice of the condition of the currency. So serious did the scarcity of cash become that whole communities were reduced to the primitive system of barter. The farmer was forced to go from person to person

and from village to village to find a cobbler who would exchange wheat for shoes or a tailor who would exchange clothes for vegetables.

Another cause was political. The soldier who had fought in Washington's army and had listened to the Declaration of Independence which had promised all men liberty and equality, came home to find himself without a franchise and as politically ineffective as he was before the Revolution. So if we just sum up those causes—and I am going to read you the connection of the lawyers with them—the causes of the Rebellion were the extreme poverty of the farmers, the destruction of commerce, the heavy taxation and its unequal incidence, scarcity of cash, and the political inequalities of the day.

When the Rebellion actually broke out the attacks of the rebels were directed not so much at the Government as at the courts. There was good precedent for this. The courts had been suspended in Worcester in 1774 when about 600 men assembled on the invitation of the Committees of Correspondence, and blocked passage to the Court House. The court thus interrupted never resumed its functions until 1776. No trials were held or judgments rendered until late in the year 1776, when the courts were again opened under the new Government. You see the people were suspicious of the courts and looked upon them as instruments of their distress. And the legal profession bound so closely with the courts was not without cause, looked upon with much popular disfavor. Since everybody was in debt, in jail or on their way to it, the people naturally looked upon lawyers, who were the instruments of the courts in the collection of debts, with hatred. Their sufferings were still further embittered by the devices of the lawyers to increase their own emoluments and by the harsh laws which doomed a debtor, however innocent, to imprisonment. In his commencement speech at Harvard in the spring of 1786, J. S. Adams discusses the lowered esteem of the profession of law. He says; "At a time when the profession of law labors under the heavy weight of popular indignation and when the mere title of lawyer is enough to deprive a man of public confidence—". This style of attack was carried on in the newspapers. In the Independent Chronicle for 1786 there is a series of ten articles attacking the courts and lawyers, signed by "Honestus." Complaint is made that the lawyers embarrass judicial proceedings, involve every individual who applies for advice in the most distressing difficulties and that the troubles of the

people primarily from debts enormously swelled by tedious law suits. "How ruinous it is to have an order of people among them who are rendering the laws a mere business of traffic."

The popular indignation found vent in petitions from towns to restrain "that order of Gentlemen denominated lawyers". The General Court was finally driven to consider these petitions but not till after the Rebellion had been subdued. On October 18, 1787, the House appointed a committee to revise the laws for rendering processes in law less expensive. "Last evening a bill for regulating the practise of law was debated and finally rejected by the House of Representatives although Mr. Carver in a lengthy speech did a tale unfold (whose word would harrow up the soul) of lawyers, impositions, charges, fees enough to make the hair stand end on end like quills upon the fretful porcupine".

How far was the hatred of the people for the legal profession justified? At the outbreak of the Revolution there were only forty trained lawyers in Massachusetts, of whom eight were practicing in Worcester County, and Worcester County in those days had a population of 47,000 people. Some of the lawyers in this county afterwards became famous. There was Levi Lincoln, who became Attorney-General of the United States under John Adams; John Sprague and Dwight Foster, Edward Banks, William Stearns, Daniel Bigelow, Peter Clark, and William Sever—not an excessive number for a population such as we had in the county at that time.

Before 1787 it does not appear that there were any statutes or rules prescribing the period of study for a candidate for admission to the bar, nor does it appear that the applicants had to pass an examination. But in 1787 the bar of Boston made it a rule that it would not recommend anyone for admission as attorney to the Supreme Judicial Court unless he had studied law three years with some barrister and had been a practitioner at the bar of the inferior courts for three years; and no candidate should be admitted unless he was a college graduate or had received a liberal education, and unless he was a college graduate he was also examined in Latin, logic, physics, mathematics and history. A study of the careers of some of these lawyers shows that the requirements brought into practice a bar which for mental strength, legal acumen, and scholarly attainments would excel the bar of the present day; and tried by the tests thus laid down and as interpreted at the time, only a small percentage of those who now make application could pass the bar examinations successfully. Of the modern actions of tort for

personal injuries which fill so large a part of the court's dockets, there was scarcely a trace and of that large body of litigation over corporate rights and wrongs there was none at all, for corporations, of course, did not exist. Most of the cases tried involved actions of contract, promissory notes; there were a few suits of trespass, occasionally a few in equity and a few petitions for leave to sell real estate.

The practice of John Sprague, prominent Worcester County lawyer, was very large. In 1784 out of nearly 2,000 actions pled in the court of common pleas for Worcester County he entered nearly 300 more than any other lawyer, unless it was Levi Lincoln, his chief rival. Across the face of most of these actions is written the name of Sprague, Lincoln, Foster and Caldwell, showing that these four lawyers handled most of the litigation of this troubled period. So enormous was the litigation at this time that "it is said that the offices of the senior Levi Lincoln of Worcester, Dwight Foster of Brookfield and John Sprague of Lancaster (principal lawyers of the county) were thronged every day with suitors, presenting the appearance of some public day so great was the gathering of the people. The door yards of their offices and the adjoining fences were thronged with horses and carriages of unfortunate debtors and not much less fortunate creditors." The amounts involved were small, in most cases not over $50.

What the lawyer of the period lost in size was made up in the number of his fees and the aggregate for those days was large. It was the recognition of this fact which maddened the farmers and led to the attack on the legal profession.

But the real reason that there was so great an outcry against the legal profession was not so much that the tone of the bar was low or the lawyers venal, as it was the fact that there was in Worcester County as elsewhere a large class of men not professional lawyers who made it a business of buying up claims and bringing suits in the inferior courts to collect. They practised largely in the inferior courts and brought these suits there to collect on those small claims which they had bought on speculation. The people hated them, applied the term "Shyster" to them and made no discrimination between high minded lawyers and the unscrupulous speculator. The harsh laws, the fact that a term in jail stared nearly every debtor in the face, the size of the professional income of the lawyer and the act of others in bringing claims into the courts were the main causes of antagonism of the people toward the legal profession.

I want to run through the military events of the rebellion. The rebels were not attempting to overthrow the civil government at Boston. Their chief attacks were made on the courts, and I think in 1786 every court in the State with the exception of one in Suffolk County, and that only because it was guarded by two thousand troops, was stopped or threatened.

The leader of the rebellion was Daniel Shays, the son of an Irish immigrant, named Patrick Shea, who was "bound out" for his passage to a farmer in Hopkinton, where Daniel was born. Daniel, himself, had a very notable record in the Revolution. He fought at Lexington and Concord, at Bunker Hill, was at Saratoga when Burgoyne surrendered, was at Stony Ridge, was made a captain and presented a sword by Lafayette himself. He seems to have been not only a good soldier, but a good companion, and the people in the western part of the state naturally turned to him for leadership in these troubled times. There were other leaders, among them Eli Parsons of Adams, Luke Day of West Springfield, Adam Wheeler of Hubbardston, and Captain Francis Stone of West Brookfield.

When the rebellion actually broke out, the State was divided, of course, into two classes, the debtors and the creditors. The debtors comprised, for the most part, the farmers and mechanics and the ex-Revolutionary soldiers, and the ex-Revolutionary soldiers formed a considerable part of Shays's army. On the other side were the conservative groups, the professional classes and the commercial classes along the seaboard. The majority of the population were, to my mind, undoubtedly in favor of Shays and his followers, and, with proper leadership and proper equipment, Shays would, probably, have been victorious.

The Legislature was not in session when the rebellion actually broke out and as there was not money available in the State Treasuary, Bowdoin, who was governor at that time, had to borrow money from private gentlemen in order to get equipment to crush the rebellion. The numbers in the field were from four to five thousand.

In September, 1786, the courts were stopped in Worcester and here you have that famous scene in which Judge Artemas Ward was prevented from holding the Court of General Sessions in this town and had to retire to the "United States Tavern."

Then the rebels directed their efforts to the capture of the arsenal in Springfield. The Federal Government was very much afraid that the rebels would be successful, but they were also afraid

that if they raised troops to oppose Shays and his followers, the people would rise in arms and would defeat not only the Federal troops but the state troops as well. And so under pretext of raising an army to quell the Indians in the Northwest, the Federal Government prepared a force to protect the arsenal at Springfield which was one of the objectives of Shays and his followers. Before the troops got there, the rebellion was over.

After the attack on the court house at Worcester by Adam Wheeler, the rebels then went to Springfield and stopped the sitting of the courts there and throughout the western part of the State, in Berkshire and Hampshire Counties. When Shays arrived in Springfield with some two thousand of his followers he found his way barred to the court house by General William Shepard. A skirmish ensued in which a number of Shays's followers were killed. Then they retreated to Pelham, near Amherst, and encamped on the hills there in the bleak of winter for several days. In the meantime the Governor had raised a force of 4,400 men. It took them nearly a week to march from Boston to Springfield. When they got to Springfield they found that Shays had retreated to Pelham. Then Shays and his followers retreated from Pelham to Petersham, a distance of about thirty miles. Lincoln, who was the commander-in-chief of the State Militia, followed him and made, what is, perhaps, the most famous march, it seems to me, in American history,—a march of thirty miles in thirteen hours in a blinding snowstorm. So cold was it that many of his men were frozen. He took Shays by surprise in the town of Petersham, capturing some two hundred of his followers. Shays himself fled to Vermont and escaped over the border into New York, where he died in Sparta in 1825.

The remainder of the rebels kept up a guerilla warfare for several months, so that Lincoln had to keep his troops in the field for two or three months longer. The rebellion was brought to a close by the election of the governorship of John Hancock, who was the popular champion and favored somewhat the cause of the rebellion and who issued late in 1788 a pardon to all of the rebels. In the courts eighteen of these men were tried for treason and convicted. None of them were executed, although it got as far as to bring Henry Gale down here on the Common and put a noose around his neck. But all of them, in the course of time, were pardoned. There is, of course, in the court records of this and other

counties, a vast amount of material dealing with the indictments against Shays and his followers.

Shays's Rebellion then, a unique and startling event in the history of the United States, was caused by economic discontent and political and social inequality. Its enduring work is found in the preamble of the Constitution.

PRESIDENT VAUGHAN. I am sure the members of the state association and the local association as well have been glad they waited to hear the address by Mr. Farnsworth. I neglected to say in opening that he is a member of the faculty of Worcester Academy, so he is one of us who take pride in Worcester. I am sure you have had a very entertaining discussion of what to most of us certainly is very, very hazy.

Mr. HARVEY. Mr. Chairman, I think we ought to have on the record a vote of thanks to Mr. Farnsworth for this extraordinarily interesting and informing address. I so move.

The motion was seconded and adopted unanimously, after which the meeting was declared adjourned.

NOTICE SENT TO ALL MEMBERS OF THE ASSOCIATION.

At the annual meeting of the Association it was voted to refer to the Legislative Committee of the Association the Second Report of the Judicial Council (copy of which was mailed to members in the December number of the MASSACHUSETTS LAW QUARTERLY), with full power to act, and to support before the General Court such parts of the report as after study, it decides to give its full approval. The report of the Judicial Council contains many important recommendations, some of which involve radical changes in procedure, both civil and criminal. There is an index at the beginning of the report on pp. 4-5. The Legislative Committee of the Association desires the assistance and co-operation of other members, and of the Bar generally, in performing the important duty assigned to it, and for that purpose will hold a public meeting at the Suffolk County Court House, Saturday, January 22, 1927, at 10 A. M. The number of the room will be posted on the bulletin board near the elevator at the Court House. All members of the Association and the members of the Bar are invited to be present, and to offer suggestions and criticism with respect to recommendations in the report of the Judicial Council. Those who are unable to be present are invited to send suggestions in writing to the Chairman of the Committee, or to make oral suggestions to any member of the Committee. The members of the Committee are as follows:

PHILIP NICHOLS, *Chairman*, 11 Beacon Street, Boston.

(Here followed the names and addresses of the other members of the Committee, see list on p. 45.)

FIRST REPORT OF THE COMMITTEE ON LEGISLATION ON THE RECOMMENDATIONS IN THE SECOND REPORT OF THE JUDICIAL COUNCIL.

JANUARY 26, 1927.

THE JOINT COMMITTEE ON THE JUDICIARY,
General Court of Massachusetts,
State House, Boston, Mass.

DEAR SIRS:

As chairman of the Committee on Legislation of the Massachusetts Bar Association, to which Committee has been referred the Second Report of the Judicial Council, with full power to act and to support before the General Court such parts of the report as, after study, it decides to give its full approval, I wish to advise the Committee on the Judiciary that the Committee of the Bar Association has considered the Second Report of the Judicial Council and thoroughly approves and heartily supports certain of the recommendations of the Judicial Council, as follows:

That the sittings of the Superior Court be fixed by rule or order rather than by statute.

That the form of writs be modified.

That nominal or chip attachments be abolished.

That the opinions of lower courts be transmitted to the Supreme Judicial Court.

That the Superior Court have power to reserve Workmen's Compensation cases for the Supreme Court.

That private conversations between husband and wife be admissible in divorce and separate support cases.

That witness fees in the District Courts and before masters and auditors be the same as in the Superior Court.

That the standard of education for admission to the bar be regulated by the Supreme Judicial Court.

That inquests be held only in the discretion of the court.

That the jurisdictional limits of the District Courts be removed.

That a third special justice should be provided in District Courts serving a population of over 100,000.

That the Secretary of the Judicial Council should receive compensation for his services.

The recommendation that the statute providing that justices of the District Court might sit in the Superior Court be made perma-

nent was approved to the extent that the statute be extended for a term of five years.

Upon the following recommendations of the Judicial Council the Committee of the Bar Association has not yet come to a conclusion, but is giving the matters serious consideration.

That juries may be waived in criminal cases.

That minor violations of the motor vehicle laws be treated as other than criminal offenses.

That the disciplining of attorneys for professional misconduct be in the hands of officers appointed by the court.

That the method of stating evidence in bills of exceptions in question and answer form be adopted.

That fees in the Supreme Judicial and Superior Courts be increased.

That appeals from the Appellate Division should not be allowed as of right.

That defendants in criminal cases in the Municipal Court of the City of Boston should be obliged to choose between final trial in that court and trial by jury in the Superior Court.

That debt collection be separated from controversial litigation.

All of the above matters require careful consideration and discussion before the Massachusetts Bar Association can be put on record as in favor of or opposed to them. The Bar Association would like to be heard on these recommendations of the Judicial Council and accordingly requests that the Committee on the Judiciary hold a further hearing or further hearings on these matters at as late a date as is consistent with its obligation to seasonably dispose of matters referred to it.

Respectfully submitted,

PHILIP NICHOLS,
Chairman.

SECOND REPORT.

JANUARY 31, 1927.

WALTER SHUEBRUK, ESQ.,
Chairman of the Joint Committee on the Judiciary,
General Court of Massachusetts,
State House, Boston, Mass.

DEAR SIR:

Supplementing my letter of January 26, I am submitting to the Joint Committee on the Judiciary the action of the Massachu-

setts Bar Association, through its Committee on Legislation, on the eight recommendations of the Judicial Council not covered by my previous statement.

The members of the Committee on Legislation of the Massachusetts Bar Association are as follows:

PHILIP NICHOLS, of Newton, *Chairman*
J. COLBY BASSETT, of Boston
DUNBAR F. CARPENTER, of Winchester
LAURENCE CURTIS, 2D, of Boston
GEORGE P. DRURY, of Waltham
LEE M. FRIEDMAN, of Boston
THOMAS J. HAMMOND, of Northampton
JOHN E. HANNIGAN, of Boston
ARTHUR D. HILL, of Boston
HON. OSCAR A. MARDEN, of Stoughton
CHARLES MITCHELL, of New Bedford
DANIEL T. O'CONNELL, of Boston
HON. ROBERT WALCOTT, of Cambridge

The members of the committee appreciate the time and study that have been devoted by the Judicial Council to the problems under consideration and they realize the wide experience of the members of that body, and they consequently hesitate to question any of its conclusions; nevertheless they feel that it was the intention of the Massachusetts Bar Association that this committee should exercise and express its independent judgment on each of the recommendations of the Judicial Council, rather than act as the means of throwing the influence of the Massachusetts Bar Association in favor of the recommendations as a whole, on the assumption that the careful and well-considered study of the eminently qualified members of the Judicial Council must necessarily have led to sound conclusions; and they have accordingly considered each proposition on its merits without allowing the approval of the Judicial Council to influence their conclusions. They have reached the following results:

(1) The committee approves the recommendation of the Judicial Council that juries may be waived in criminal cases. Mr. O'Connell dissents, on the ground that many defendants might waive their constitutional right to jury trial without fully realizing what they were doing, and in the belief that justice is better administered in criminal cases through the established system of trial by jury.

(2) The members of the committee unanimously approve in principle the recommendation of the Judicial Council that minor violations of the motor vehicle laws be treated as other than criminal offenses, but are not entirely in accord with all of the details of the method of reaching this result advocated by the Judicial Council. They believe this matter is one requiring prompt and immediate action by the Legislature, and urge the Committee on the Judiciary to give the recommendations of the Judicial Council and recommendations to the same end by others most careful consideration in order that it may evolve the most satisfactory method of meeting this troublesome situation.

(3) The committee approves the recommendation of the Judicial Council that the disciplining of attorneys for professional misconduct be placed in the first instance in the hands of officers appointed by court. Mr. Mitchell, Mr. Drury and the chairman dissent, on the ground that it would be unwise to give official standing to groundless complaints against reputable attorneys.

(4) The committee approves the recommendation of the Judicial Council that the method of stating evidence in bills of exceptions in question and answer form under certain conditions be adopted, subject to the followng qualification. The Supreme Judicial Court has hitherto consistently insisted that the statement of evidence in bills of exceptions be reduced to narrative form. It is well known that the labors of that court have increased to such an extent as to tax the capacity of its members to the utmost, and the members of this committee are unwilling to support any legislation which will make the duties of the members of that court still more onerous, even if the labors of counsel will be correspondingly relieved. Unless, therefore, it shall appear that this recommendation has the approval of the Justices of the Supreme Judicial Court, it does not have the approval of this committee.

(5) With respect to the recommendation of the Judicial Council that the fees of the Clerks of Courts be increased, the members of the committee have taken the following positions:

They do not believe that public policy requires that the offices of the Clerks of Courts be supported by the litigants. The maintenance of courts is one of the primary functions of government, and the existence of courts in which justice will be administered when the occasion arises is for the benefit of the public as a whole, and not merely for the benefit of those who, often through no fault of their own, are from time to time the litigants in such courts. The public as a whole should pay for the courts, and only such fees should be imposed as will tend to ensure on the part of litigants a serious intention to use the courts for legitimate purposes and will discourage frivolous litigation or frivolous use or abuse of the judicial process in any form.

The majority of the committee believe that in view of the change in the purchasing power of the dollar since the present fees were established, a general increase in the fees of Clerks of Courts

should now be authorized. Mr. Hammond and Mr. O'Connell dissent.

The members of the committee do not approve an increase in the price of writs, or an entry fee in the Supreme Judicial or Superior Court in excess of $6.00 in the case of actions of law, or in excess of $10.00 in the case of bills in equity. Mr. O'Connell does not approve of any increase in entry fees.

(6) The committee, with some hesitation, approves the recommendation of the Judicial Council that appeals to the Supreme Judicial Court from Appellate Divisions be allowed only in the discretion of the Supreme Judicial Court. Their hesitation is due to that fact that this class of appeals does not appear to have yet become so numerous as to unreasonably burden the Supreme Judicial Court. As it further appears that in the great majority of cases the Appellate Division is sustained, if the other recommendation of the Judicial Council that the opinion of the lower court be transmitted in all cases to the Supreme Judicial Court is adopted, such cases if involving no new and difficult points of law could be disposed of by the Supreme Judicial Court summarily by a per curiam opinion approving the decision of the Appellate Division. Mr. O'Connell dissents from the vote of the committee, on the ground that the statute establishing the Appellate Division was enacted by the Legislature on the assurance by those who supported it, of which he was one, that defeated litigants would have an unlimited right of appeal to the Supreme Judicial Court, and he feels that to support the present proposal would be a breach of faith on his part. He also feels that the matter should be deferred until the whole subject of intermediate court of appeal is given consideration.

(7) The committee approves the recommendation of the Judicial Council that defendants in criminal cases in the Municipal Court of the City of Boston should be obliged to choose between final trial in that court and trial by jury in the Superior Court. Mr. O'Connell dissents, for the reasons stated in connection with the waiving of jury trial in criminal cases, and for the further reason that in his opinion one of the evils against which this bill was aimed, namely the congestion of the Superior Court by appeals intended for delay, has been already cured, in Suffolk County, at least and can be cured in every county by providing an adequate staff for the District Attorney and a sufficient number of sessions of the criminal court, which can be secured by calling up such District Court Judges as are needed.

(8) The committee approves the recommendation of the Judicial Council that debt collecting be separated from controversial litigation.

In the cases in which the committee has not been unanimous, I have stated the views of the minority at length. In most of the

instances in which the majority supported the recommendations of the Judicial Council, they were influenced by the same considerations which led the Judicial Council to make the recommendation, and which are set forth in the report of that body, and repetition of this material would be unnecessary.

I regret very much that an engagement of long standing to speak at a meeting in a distant part of the state will make it impossible for me to be personally present at the meeting of your committee next Wednesday; but very fortunately Judge Marden, a member of our committee, who has given most careful consideration to the recommendations of the Judicial Council, has consented to take my place, and will appear before your committee next Wednesday.

Very truly yours,

PHILIP NICHOLS,
Chairman.

REPORT OF THE ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS.

Printed by permission of the Committee with the consent of Chief Justice Rugg.

[By Chapter 532 of the Act of 1922 it was provided that

> "There shall be an administrative committee of district courts, which shall consist of the three presiding justices for the time being assigned by the chief justice of the supreme judicial court to act in the appellate divisions. . . . The committee shall be authorized to visit any district court, other than the municipal court of the City of Boston, as as committee or by sub-committee, to recommend uniform practices, forms of blanks and records, and to superintend the preparing of records by clerks. . . . To promote co-ordination in the work of the courts, the administrative committee may call a conference of any or all of the justices of the district courts. . . ."]

(A previous report was printed in the QUARTERLY *for February, 1925, p. 55.)*

NOVEMBER 20, 1926.

HON. ARTHUR P. RUGG,
Chief Justice Supreme Judicial Court,
Worcester, Mass.

DEAR JUDGE RUGG:—

It is our pleasure to again submit to you a formal report of our work. There has been very little change in the general scope of our activities except as experience has shown better methods and legislation has required the development of procedure and practice. We have found a continuance of our frequent conferences with the other law-enforcement agencies to be mutually advantageous. The work of the District Courts is closely related to that of the Superior Court on the criminal side, of the District Attorneys and to the various boards such as the Probation Commission, Prison Commission and the Registry of Motor Vehicles of the Department of Public Works. The value of these conferences has been amply shown by the marked increase in better understanding and co-ordinated work.

The fall of the year 1925 brought to a climax of public interest the matter of major criminal offences, the problem of the regulation of motor vehicles and connected therewith criminal procedure in

the courts and the probation and parole systems. Our own personal experience as trial judges and our intimate knowledge of the work of the courts naturally gave us a point of view somewhat different from that of the public and certain officials and especially those exercising administrative authority. No active judge can possibly have the same viewpoint as he looks from the inside out as does a person from the outside looking in nor can the views of men dealing with statistics coincide with those of judges dealing with human beings. When agitation and comment ripened into proposed measures we deemed it best to attend the legislative hearings that we might know the volume, weight and specific items of the criticisms of the District Courts and the judicial procedure, criticism which seemed confined to the courts in and around Boston. We construed our duty to be that of advisers only and administrators of the laws as enacted by the representatives of the people to be served. When some of the proposed legislation became law, we addressed a letter to our colleagues under date of August 25th, 1926. (*Reprinted in 2nd Report of Judicial Council, Appendix A, pp. 85–93, see Massachusetts Law Quarterly for December, 1926.*) It is not necessary to again mention all the matters therein set forth. It was our hope that by this means we might help to establish both uniform procedure and intelligent, responsive administration of the law.

We cannot refrain from some comment upon this legislation as well as some that has preceded it. A considerable volume of the new legislation which has more particularly concerned our courts during the past few years has seemed to us of doubtful wisdom. Unless it is clear beyond dispute that judicial discretion has no longer any place in the administration of the criminal law or has been abused by the generality of the magistrates, it is in our judgment a step in the wrong direction to deprive the courts of such discretion particularly in the imposition of penalties. The tendency has been to force the courts into a position where they have to deal with crime rather than with criminals. We cannot believe it wise that the courts should be restricted simply to the determination of guilt or innocence of a defendant. A law once enacted is state-wide in application even if the conditions which it is intended to correct are confined to limited arrears. An example of the legislation to which we are referred may be found in Chapter 297 of the Acts of 1925 which in substance and in practice requires the procuring of a record from the office of the Registry of Motor Vehicles before a

complaint for driving a motor vehicle under the influence of intoxicating liquor may issue. Police officers cannot arrest for this offence. Consequently there is often an arrest for a purely imaginary offence in order to hold the operator until the information from the office of the Registry of Motor Vehicles can be obtained. The net result of this law is simply to cause delay, trouble and expense. If it be urged that the law was passed to prevent second offenders from escaping a sentence, the answer is first that this committee had obtained practically universal acceptance of the policy of obtaining the record of every defendant in such cases before sentence was imposed prior to the enactment of said law and such defendants as were second offenders could be sentenced to jail for a first offence under the law as it then stood. The enforcement of this law would now be made far more effective and less costly if the legislature would authorize arrests by police officers for this offence and amend the law so as to require the obtaining of the record of the defendant before imposing sentence if pleading or found guilty. This would seem to be so evident an improvement over the present practice as to appeal to the favorable consideration of the law-making bodies. The same awkwardness of procedure, incident delay and cost have followed the enactment of the so-called Crime Wave Measures as found in the Act of 1926. Whatever sound basis, if any, may have existed in certain parts of the state there was no failure of justice throughout the largest part of the Commonwealth. We believe that in serious crimes the record of the defendant should be obtained. The time for such information however arises upon conviction and not at the time of arraignment. The abuse of bail has never been found to be prevalent except in the Metropolitan district. Probation officers are now required to spend much time which might be otherwise profitably employed in the discharge of their real duties in making records and transmitting the same to the Probation Commission. There is general agreement that the record of conviction of serious offences should be filed in a central agency and available for us but the record of a conviction for failure to license a dog for crossing a railroad track and of every continuance of such a case as well as the father's and mother's name of such offenders does not add greatly to the sum total or human knowledge.

We mention these matters not in a critical spirit but to show the difficulties which have been imposed upon many of the courts by this legislation. We are inclined to think there will be public comment sooner or later upon the cost of all this interchange of infor-

mation as there has already been criticism of the required records in minor cases. Nevertheless as we stated in our letter of August 25th it is the duty of the courts to support the laws as enacted and to enforce them in a spirit of strict compliance with the will of the people thus expressed and we believe the courts without exception are so doing.

It seemed desirable that we establish closer contact with the executives of our penal institutions and training schools. Accordingly we visited the former during the winter of 1925 and 1926 and the latter very recently. These visits gave us an opportunity to meet the executives, to inspect the institutions, to advise Justices as to the conditions found and particularly to call to the attention of the courts the types to be committed to each institution. A better understanding of this phase of our work ought to be of value to the individuals most directly concerned and to the institutions which may be and doubtless have been burdened and hampered in the past by the commitment of persons for whom there are no especial advantages or benefits to be obtained by such commitments. Our recommendations are fully set forth in our circular letter.

We have found our regional conferences begun the second year of our official life, to be a most useful and valuable part of our work. Each year we call the Justices, Special Justices and other officials of the courts together at convenient central places such as Pittsfield, Springfield, Northampton, Worcester, Fitchburg, Salem, Taunton, Middelboro and Boston. At these conferences we discuss matters which concern all the courts, problems of procedure, interpretations of the law and in fact any matter which is of interest either to the committee or to those gathered in the conference. The spirit of these gatherings has been most friendly and helpful. We believe that this part of our work has been the most distinctive contribution which we have made and alone justifies the continuance of the experiment of an Administrative Committee. These conferences begin as a rule in late September and do not finish until early spring. The labor and time involved in preparing for them and in the actual sessions is very considerable but more than compensated for in the opinion of the committee by the results obtained.

In the Appellate Division there has been slow but steady increase in the number of cases. The Bar and the Justices are becoming more familiar with the procedure and the advantages offered. The services of the Justices assigned to this work have been uniformly painstaking and intelligent.

The Judicial Council has done us the honor to ask our advice with reference to certain matters in which the District Courts are particularly interested. We have gathered the opinions of the judges and other officials as to these matters and transmitted them through our chairman to the Council.

It may interest you to know that the Justices of the District Courts are practically of the unanimous opinion that the jurisdictional limit on the civil side should be removed and that the entry fee which is now but the nominal sum of one dollar should be increased by a graduated scale according to the ad damnum in the writ.

We also have investigated the matter of statutory changes to expedite the disposition of minor violations of the Motor Vehicle Law and municipal ordinances. The information obtained has been transmitted to the Judicial Council for appropriate study by that body. We are continuing the compilation and publication of the District Court statistics.

Again we are glad to report a friendly, helpful spirit shown by all with whom we have had contacts, a continuing growth in the consciousness of the unity of the courts, in the intelligent study of the duties and responsibilities and improving technique in dealing with changed and changing conditions.

We are always conscious of your deep interest in our work and this knowledge has been of great and continuing encouragement.

Respectfully yours,

FRANK A. MILLIKEN,
JAMES W. MCDONALD,
CHARLES L. HIBBARD.

ADDRESS AT THE DINNER OF CORPORATE FIDUCIARIES ASSOCIATION OF BOSTON, AT THE SOMERSET HOTEL, BOSTON, MASS., DECEMBER 16, 1926.

By Robert Grant.

(Formerly Judge of Probate of Suffolk County, Massachusetts.)

So far as borne out by current practice in every branch of life, not even excluding the ministry, competition between man and man continues to survive. Some philosophers and most individuals who are unsuccessful would provide a substitute, but thus far idealists even though reinforced by the Shibboleth "The brotherhood of Man" have been unable to agree on one which would successfully eliminate hardy emulation between individuals without causing the world to stand still, if not inviting starvation of all except the bureaucrats. It is significant that the American people, the foremost exponents of pure democracy, have by impressive majorities continuously countenanced the doctrine "Do your damndest to win out against the other fellow." Not necessarily always by accumulation of this world's goods, though this is apt to follow, but by showing the mettle that is in one in facing responsibilities. If Dr. Cadman should drop out of broadcasting tomorrow some other doctor of divinity would aspire to fill his shoes without imperilling in the eyes of our people his chances of entering the Kingdom of Heaven. Indeed I see little to choose in that respect between an idolized prima donna, an eloquent and spiritual broadcasting clergyman, a Henry Ford, an often maligned but oftener patriotic banker, and the latest refinement of modern banking initiative, the banking corporate fiduciary. The best of each kind should slip through the eye of a needle without difficulty according to revised common sense opinion, scripture to the contrary notwithstanding.

There is this refinement, however, to be drawn between all the others and the last named: a corporation, even a corporate fiduciary, has no soul, whereas every one of the others is to be credited with one. This is to be sure a legal disability which the revised current opinion already referred to is doing its best to rectify or at least to counterbalance by equivalents, so that corporate conscience today is expected to be as spontaneous and self functioning an organ as that of the individual, and with no less claims for every body contributing to this on the needle's eye and the Kingdom of Heaven.

Yet if the brotherhood of man still holds to competition as the life of trade, it no longer does so on the old bald terms. "Dog eat dog" used to be so literally provocative that commercial rivalries approximated armed camps where no quarter was given to opponents and any method of discovering the other fellow's secrets short of absolute theft was regarded as permissible if not Christian. Some thirty years ago I read before the Bar Association some verses which began

> "Let dogs delight to bark and bite and doctors disagree;
> It were not well that all mankind should dwell in unity.
> If with consummate peacefulness the Christian world were blest,
> Some occupations would be gone, and ours among the rest."

I was addressing a company of lawyers who necessarily would lose their bread and butter were an idyllic state of society, from which litigious strife had wholly disappeared, to be evolved. It was a risk they had to run, but was not to be broadcasted from the housetops. In continuance I also reminded them as follows:

> "But brethren of the legal faith, how pleasant 'tis to see
> A company of men of law sit down in harmony,
> To see the members of the bar in social union dine
> And join in song and chorus strong across the nuts and wine!
> No quarrels have we of our own, we manage others' broils,
> And though we fight with all our might, we've buttons on our foils;
> We scratch a brother lawyer's eyes until they're out and then
> We go to dine with him that night and scratch them in again."

Developing this thought, I recognize that though you are not a company of lawyers, you have not only foils, but also buttons on them. That is to say you are individually rivals with the competitive fever in your veins, but also have come to recognize that the best road to progress and the best means of avoiding the evils of rivalry is to sit down now and then together in order to compare notes and thresh things out. Getting together at a table, whether for statesmen or for corporate fiduciaries is the sane modern method of mutual yet individualistic efficiency. What is the other fellow thinking about? I will suck his brains (as you are sucking mine) and he may not know it.

And also the other fellow has come to mean not merely your deadly smiling rival, but also the public you serve. The business note of today is "I will try to get ahead by making conditions more agreeable, equally safe but more profitable for that unhappy beneficiary, as he once certainly was, the *cestui que trust* impressively called." Of all the uncrowned kings of earth, one of the most

tyrannical was the testamentary trustee of a generation ago, though he was accustomed to think of himself as a honey-tongued Argus. Honest, scrupulously honest, he undoubtedly was,—certainly in this vicinity, in ninety-nine cases out of one hundred. But on the other side of the slate balancing his defects against his merits the recording angel must have written large the despotic sentiment "If the *cestui que trust* is allowed to live, he ought to feel grateful, for he has a fixed and stable income. But between you and me he is a worm, and the less I have to bother with him the better. I don't want him round." Perhaps it will sound strange to you to hear that very shortly after I was appointed Judge of Probate of Suffolk County in 1893, the Judges of Probate had occasion to meet to prepare new probate blanks for approval by the Supreme Judicial Court. And what do you suppose one of the proposed changes was, urged by me and opposed by some of my brother Judges? No less a thing than to oblige executors, trustees, etc., to give actual notice to beneficiaries of the filing of an account. Hitherto it had been the high and mighty custom of these uncrowned kings to insert a printed notice in the *Boston Daily Advertiser* or *Transcript* and let it go at that. If the beneficiary happened to see it, so much the worse, for he was liable to ask tiresome questions by personal interview or letter (for there were no telephones), and if he didn't see it so much the better, for were not they themselves the last word in integrity?

The change was made, and ever since those in a fiduciary capacity have been required to give actual notice to the poor worm or worms whose equitable interest in the property, meaning the life income and often power to dispose of by will, had been so far subordinated by custom as to encourage even in the minds of the court the pleasant fiction that trustees who had the legal title had pretty nearly the right to tell life tenants to go to the devil provided they themselves didn't steal, falsify or incur bad losses. The theory of the judges who opposed the change appeared to be that sending notices by citation cost money and that the phrase *cestui que trust* really meant what it seemed to say on the face of it,—that the beneficiary was expected to trust and that if he didn't, he ought to watch the newspapers.

It seems a long time since then, though only 30 years. So complete has been the reversal of the old attitude that the underlying basis of the relations between fiduciaries and their beneficiaries today is actual notice of what is about to be done. If that is given

accurately and in good faith the beneficiary has only himself or herself to blame if there is no opposition on the return day. Indeed, so much water has flowed under the mill during my long term of office, and so well established has become this later practice of the lion and the lamb to lie down together in harmony that I was disposed to think when the invitation to address you came to me that I could only talk platitudes and that your members by constant contact with the Probate Court (or rather the registers and assistant registers and sucking their brains), as well as by independent careful study of the decisions, knew everything that I could tell you.

Yet on reflection I was reminded that neither is the millennium at hand, nor has anyone so far as I know,—anyone with the experience that I have had, and whose tongue is no longer fettered by judicial office—set out in relief a few of the cardinal truths which ought to govern the conduct of fiduciaries, and this more particularly because of the growth of that new creature of social progress, the Corporate fiduciary. Elementary as some of these truths are and often as they have been defined in the Reports, their significance somehow, to judge by what I have observed, finds difficulty in sinking in and serving as a warning. Five of these come to my mind at once.

1. Do not put too many eggs into one basket.

2. In dealing with one's self in a fiduciary capacity, a trustee who fails to lean over backwards is liable to come to grief and be made to disgorge.

3. Fiduciaries,—corporate ones as well as those of flesh and blood,—should ever bear in mind that it is easy to develop fiduciary arterio sclerosis.

4. The very convenient, but improper tendency, among trustees, including banks and Trust companies to select as guardians ad litem for their accounts persons who are under obligations to them or with whom they can drive a hard fisted bargain to do the job by wholesale is contrary to *bonos mores.*

5. The doctrine of "Safety First" though salutary in essence becomes despotic if it results in the tenant for life receiving a meagre return in order that the corporate fiduciary may sleep nights and exercise no mental agility.

All of these interdictions bear their own caveat at first blush, yet all of them justify stressing for the reason that either from temptation, greed, economy, carelessness or malice aforethought they are constantly broken. Corporate fiduciaries, though they have

no souls, are Briarean, not individualistic. They work through employees or agents who though forbidden to practise law by statute in order not to take the bread out of the mouths of regular lawyers, are expected to be accurately familiar with the technique of the care of property and are encouraged by the management, in order to save attorney's fees, to buttonhole the officials of the several registries of Probate so as to discover the idiosyncracies of individual judges and what is requisite in order to get by. Yet they sometimes remain ignorant or callous to some of the fundamental truths to which I shall refer again presently.

There is much of an appeal to the well-to-do man in the street in a trustee who is corporate. To begin with a Trust company or National Bank cannot abscond, and though it may fail, the likelihood of that in the case of the well-established and large institutions is so slight as to be virtually negligible in such a community as this. Personally I should prefer as the trustee of my own property a blood relative or friend in the prime of life with good judgment, initiative and experience and with sufficient vested interest in the principal or warm sense of responsibility as to be kept eternally vigilant. But this choice is subject to the total misapprehension of every testator as to the qualities of selected individuals, who may turn out to be erratic, pigheaded, dull or even criminally careless. Because of this liability the man of large means has been apt in the past to select as his executor or trustee some one of the considerable number of able and scrupulous individuals in our community known as professional trustees. It is with them, of course, that the corporate fiduciary has to be compared, and I am too much of a canny Scot to be willing to answer unqualifiedly the obvious question "Under which King, Bezonian? Speak or die."

I am willing, however, to declare that I know no reason why a Trust Company or National Bank should not be able to handle trust property as safely and capably as any individual and why prudent testators should not have recourse to them. In the nearly 30 years that I was judge of Probate, I can count on the fingers of one hand the instances of individual trustees who have embezzled the property to my knowledge. This undoubtedly does not cover every case, but the percentage has been exceedingly small. On the other hand the number of individual trustees afflicted with fiduciary arterio sclerosis or hardening of the arteries is so large that any enumeration if feasible would probably read like a catalogue of ships. But a corporation may suffer from disease no less readily

than an individual, and unless eternally vigilant through thoroughly efficient and frequent inspection of each trust is liable, because of the vast number of securities in its vaults, to prove in the end a doddering custodian in the eyes of individual beneficiaries. And it is of course the individual *cestui que trust* who counts on the score of reputation. If there is any fine distinction to be drawn between the individual trustee and the corporate, it might be said that the mortal disease of the former is the hardening of the arteries referred to and that of the corporate fiduciary automatic fatty degeneration of the brain more succinctly described as self-complacent torpor. For instance, although the corporate fiduciary is far less apt than the individual to put too many eggs into one basket in any particular trust, I should suppose there was a likelihood unless it were especially scrupulous, that it would look after its own safety,—the safety of the principal—so guardedly that the beneficiary might not infrequently be facing another uncrowned King, though a very obsequious and plausible one, whose elegant surroundings lack only the nursery motto

"'Will you walk into my parlor?'
Said a spider to a fly.
'It's the prettiest little parlor
That ever you did spy.
The way into my safety vaults
Is down a winding stair
And I have lots of pretty things
To show you when you're there.'"

Then again I used to find especially repugnant to the morals of the court the rather sly habit of corporate fiduciaries of trying to select their own guardians ad litem, partly for convenience and partly for the sake of thrift,—a thoroughly reprehensible practice whatever be its motive. Each one of them, if it could, would like to have its own man Friday, which, of course, if permitted would in its essence be another instance of dealing with one's self in a fiduciary capacity,—that too frequent stumbling block or pitfall of the present generation of financiers—for the man Friday would be merely the corporation in another guise to all equitable intents and purposes. I remember one instance where a Trust company had an attorney on tap ready to serve as guardian ad litem on all its accounts at $5 per account,—the difference between wholesale and retail. Needless to say this was ruthlessly interfered with by the bench. And while we are on the subject, does not proper protection for beneficiaries demand that a corporate fiduciary which has a trust department and

also buys and sells bonds should not merely keep the two absolutely distinct, but should abstain altogether from unloading the bonds that it has for sale on any of the trusts in its custody? Customers of ordinary banking houses are expected to bear in mind the warning "Caveat emptor," and should not be surprised if the smiling and highly respectable partner to whom they apply for a good investment puts them into securities which the firm has on hand to float and get rid of. But the corporate fiduciary who follows the same practice is certain sooner or later to be discredited on the score of not letting his right hand know what his left hand was doing. Under the pressure of competition ethics which seem elementary to the courts are liable to be ignored by those who have securities to sell which hang fire because second chop or under-subscribed.

I have never been able to see why the Trust companies and banks are not in most respects eminently safe and serviceable custodians of property to be held for years in trust. I remember, however, that while I was on the bench there was a caveat on file for years in my court requesting notice of any petition to appoint a national bank as an executor or trustee. That bridge was crossed, however, by the Supreme Court of the United States in 1917 when it decided in *First National Bank* v. *Union Trust Co.*, 244 U. S. Reports 416 that "the circumstance that a function is of a class subject to state regulation does not prevent Congress from authorizing a national bank to exercise it; nor would it lie with the State power to forbid this." This judgment assuring the validity of the provisions in the Federal Reserve Act giving the Federal Reserve Board authority "To grant . . . to national banks applying therefor, when not in contravention of state or local law the right to act as trustee, executor or administrator" has put corporate fiduciaries definitely on the map with every promise of increasing prominence. They have thus become in a sense the rivals of lawyers and the individual trustee with large holdings of the past generation. The fact that they can by luminous advertizing secure large patronage does give them what seems at first sight an unfair advantage over members of the bar whose professional code of ethics does not permit this. I prefer merely to scratch the surface of this unsettled controversy. Yet it seems to me that the corporate fiduciary so long as it obeys the state injunction forbidding it to practise law, is within its equitable rights in soliciting the care of property no less than in soliciting deposits, and that the bar and individual trustees must accept this new form of public service as one of the incidents of the

workings of intelligent competition. Just as a neighborhood which is one day the centre of fashion may in half a century become run down at heel and the prey of boarding houses, and yet the shifting of values be accepted as a natural incident either of progress or what the public wants, so the invasion of the care of property held under legal documents by banks and Trust companies can scarcely help being regarded in the end as mere logical evolution which has for its motto "The devil take the hindmost." If the public finds the corporate fiduciary a tower of strength and beneficent protection, the corporate fiduciary will thrive. If on the other hand, having no soul, it proves to lack conscience into the bargain and merely garners without giving that close individual attention to each trust which every first-class individual trustee does give, the public will not long be beguiled by marble halls and waiting rooms with free stationery. I should hate to have any trust fund in which I was interested managed by a mere Committee on investments who assigned in a more or less perfunctory way this or that security to my box, and I should hate even more to have my property because it was small supervised by an underling who knew the routine of probate practice, but was utterly without the sagacious experience essential to a prudent yet vigilant investor.

I am quite well aware that the serious question before most corporate fiduciaries is that of making both ends meet in dealing with trusts. In their desire to make the charges against the estate as small as possible so as to please the beneficiary and the increasing demands on expert knowledge due to inheritance and income tax problems they are constantly between the devil and the deep sea. The modern fiduciary whether individual or corporate is as much of a contrast to his predecessor of fifty years ago as the hard-worked and resourceful traffic officer of today is to the rotund, slow moving but highly respectable police officers who patrolled Beacon Hill when I was a boy. But because of this increasing cost, it is vital that the *cestui que trust* should not be made the scapegoat either by undue charges for service or by the employment of subordinates of mediocre attainments for small pay in order to save the expense of expert experience and thus do business at a profit. The charge of six instead of five per cent on the income has been recognized by the probate courts as reasonable in many cases, but even a larger charge for special service would be preferable to trying to make both ends meet by dispensing with expert assistance and the failure to give to each trust the benefit of the personal supervision of a specialist.

Of the five elementary truths on which I have touched, to all of which I have already to some degree reverted, that of remembering not to put too many eggs into one basket is perhaps the most elementary of all. Yet it is surprising how frequently in the case of individual trustees it has been disregarded. The case of *Dickinson Appellant* 152 Mass., decided in 1890, would seem explicit enough. Here the trustee of a fund just over $16,000 invested $3,573.75 in Union Pacific Railroad common stock in May, 1881, and in the following August $2,475 additional. The trustee was held personally liable for both expenditures. Yet in 1902 a trustees' account came before me where the estate was $30,000 and in a period of four years $12,313.67 had been invested in Atchison & Topeka stock and bonds. On my own initiative,—for I happened to examine the schedule C—I allowed after a hearing the first investment $2,000 in bonds and the first two purchases of stock, but disallowed the last two purchases of stock and the last purchase of $5,000 bonds. The trustee appealed and the Supreme Judicial Court in *Davis Appellant* 183 Mass. sustained my decision, declaring in its own "And while we recognize in this case as the Court did in that" (Dickinson Appellant) "the 'hardship of compelling a trustee to make good . . . we cannot in this case any more than the Court could in that hold that upon the evidence the trustee was justified in investing in the stock and bonds in question so large a proportion of the trust property.' "

I mention these decisions just to show how readily men who are supposed to be prudent are unable to see for themselves how contrary to prudence their action on the face of it sometimes is. Against this particular form of maladministration Corporate fiduciaries, conservative by nature as a class, are presumably on their guard. The greatest risk which they seem to me likely to incur is that which might result from the fatty generation of the brain or torpid and perfunctory service already mentioned, a disease the results of which are liable to be so disastrous that in one instance they lent themselves to a homily from my pen in print, which I will read to you in conclusion. To be sure the trustee impersonated was an individual not a corporate fiduciary, but whether one calls the disease fiduciary arterio sclerosis or fatty degeneration of the brain, is immaterial, for the facts,—the entirely possible facts in my narrative might apply with equal force and veracity to a Trust company or bank which was easy going and lacking in shrewd perspective. Perhaps some of you have read what I refer to already in one of the

chapters of my little book "Law and the Family" (Charles Scribner's Sons, 1919). If so, you will pardon, I am sure, my audacity in inviting you to listen to it again. It seems to me, however, the best sort of object lesson that I can offer from a mere unworldly philosopher,—once a judge of Probate, to a gathering of sagacious and highly experienced corporate fiduciaries. The extract is as follows:

"The testator in question, a bachelor, made a will shortly before his death some seven years ago in favour of two nieces, to whom he left seventy-five thousand dollars apiece in trust. Anticipation of income was forbidden, the corpus securely guarded from the recklessness or greed of future husbands, and the trustee chosen one of the salt of the earth, a God-fearing man and contemporary of the testator, noted for his integrity and conservatism. The property which the trustee took over consisted of gilt-edged stocks yielding not quite five per cent net, but tax exempt so that each of the girls could look forward to about three thousand annually. What better could one ask? you say. Quite so; but one of these girls was wise in her generation and one was foolish and I leave it to you to decide which was which.

"Their names were Jane and Dorothy, but, though sisters, their characters were very dissimilar. Jane was a model of amiability and reasonableness, but Dorothy was opinionated and flighty. Each was thrilled by her inheritance, but not a great many moons had waxed and waned before Dorothy began to cause trouble. She was on the eve of marriage, and she got it into her head that the trust fund did not yield sufficient income. Possibly the young man to whom she was engaged put her up to it. Whether this was true I am uninformed, but I know that Mr. Waters, the trustee, believed so. Dorothy retaliated by applying the epithet 'back number' freely to Mr. Waters when out of his hearing, and by inquiring if there was no way of getting rid of him and substituting some one more 'up-to-date,' though be it said that Mr. Waters was only just sixty and well preserved.

"It is not material to give the details of Dorothy's ungrateful conduct; suffice it that in the end her cantankerous animadversions so worked on Mr. Waters's sensibilities that he consented to resign. He regarded his decision as weak, but he was weary of being perpetually harassed by the cavillings of this misguided beneficiary—so unlike her serene sister. But he remained firm on one point—he would not consent to the appointment of Dorothy's adviser, who was not her husband, as his successor. He compromised finally,

however, by agreeing on a 'disinterested person' of their selection —a man against whom he knew nothing prejudicial, and about fifteen years his junior—just to keep the peace. This was shortly before the outbreak of the present European war, and one inducement to Mr. Waters's consent was the disagreeable consciousness that several of the gilt-edged securities belonging to the trust had been misbehaving—shrinking in value for no apparent cause, and in one or two cases threatening to pass their dividends. Their misbehaviour was just enough semblance of justification to Dorothy's eagerness for a change.

"Mr. Post, the new trustee, entered on his duties, informing Dorothy in answer to her hope for a larger return that he was 'a believer in new values'—whatever this might mean. It happened that the reasonable Jane married about this time and reassured by Mr. Waters that the loss of income on her share would in his opinion be merely temporary, went to live in another city. Consequently the sisters met but seldom and ceased to be in close touch with each other's concerns. Three years elapsed; then one day Jane was distressed by the receipt of a letter from Dorothy announcing that Mr. Post had suddenly gone insane—'stark, staring mad,' so it read, 'and there is reason to believe that he has been out of his head for some time. All his affairs are in confusion and we are uncertain where we stand.' As Jane had been hankering to ask her own trustee some searching questions, her sister's tribulation jibed with her own needs and she hastened to her native city.

"A week of excitement, uncertainty and revelation ensued, after which, to make a long story short, an accounting was required of the respective trustees. The exhibit thus made—the account of Mr. Post the insane man, being rendered by his legal guardian, was highly edifying. Taking Mr. Waters's figures first, the gilt-edged securities that he had received from his testator appear with their inventoried, then with their present market, value as follows:

		Inventory Value	Market Value
100	N. Y., N. H. & H. R. R.	$18,000	$2,500*
100	Fitchburg R. R. Pfd.	13,500	5,500
50	Boston & Albany R. R.	12,000	7,500
50	Boston & Maine R. R.	8,000	1,250*
50	Old Colony R. R.	10,000	5,000
50	Conn. River R. R.	13,500	6,000
		$75,000	$27,750

* Dividends suspended.

"Before submitting Mr. Post's figures (as rendered by his legal guardian) it should be said that from the outset of hostilities he had been known to expatiate excitedly in private on the cheapness of all American industrials having to do with the Great War. This idea evidently went to his head and may be regarded as the first stage in his dreadful malady. It appears that immediately after his appointment as trustee he sold all the securities handed over to him by his predecessor, and assumed an initial loss of about fifteen thousand dollars; then he plunged in; otherwise the schedule explains itself.

	Inventory Value	Market Value
100 Cuban American Sugar	$5,000	$20,000
100 Bethlehem Steel	7,500	60,000
100 General Motors	9,000	80,000
100 Studebaker Corp.	10,500	16,000
100 Amer. Coal Products	9,500	16,000
100 Texas Company	12,000	24,000
100 South Porto Rico Sugar	6,000	22,000
	$59,500	$238,000

"Of course the guardian by consent of court had already reduced to cash his entire holdings, much to the joy of the flighty Dorothy, who could not refrain from whispering to her husband while still within earshot of the conservative Mr. Waters; 'To think of being distanced by an insane man! Wouldn't that jar you?' In other words, the value of the conservative trustee's investments had shrunk from $75,000 to $27,750 and that of his rival risen from $59,500 to $238,000.

"As they say in the vernacular, Can you beat it? The anecdote, if not literally true, might very well be. *Se non è vero, è ben trovato.* The moral would seem to be that the values of yesterday not infrequently become the scrapheaps of tomorrow. Perhaps from this point of view there are grounds for the conclusion that the younger generation, where their own interests are at stake, are quite as apt to be wide-awake and discerning as the sagacious individuals selected by their grandfathers."

JOHN ADAMS AND AMERICAN CONSTITUTIONS

An Address delivered at the Midwinter Convocation of George Washington University, at Memorial Continental Hall, in Washington, D. C., February 22, 1927

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Three hundred years ago, William Penn wrote: "Our great men were designed by the wise Framer of the universe * * * for lights and directions to the lower ranks of the numerous company of their own kind, in precepts and examples." It is the distinction of great leaders that they are the first to feel the movement of an age, recognize its significance, and give it direction. Hence it is that he who wishes to understand the fundamentals of his government must keep himself familiar with the lives of its founders. It was with this purpose, that the wise old author of the *Book of Ecclesiasticus* exclaimed in glowing words: "Let us now praise famous men * * * such as have brought tidings in prophecies, leaders of the people by their counsels and by their understandings; men of learning for the people; wise were their words in their instruction. All these were honored in their generations and were a glory in their days."

At the present time, the tendency among writers seems to be, not so much to praise famous men as to minimize their greatness and to emphasize their commonness. The modern biographer not only paints a Cromwell with his wart, but also a Cromwell consisting chiefly of warts. Oliver Goldsmith said of Dr. Johnson that he would make all his little fishes talk like whales. The modern biographer seems to try to make his whales talk like little fishes. Formerly the life of a great man was held up as a model and an incentive. Now, under the plea of "humanizing" his subject, the biographer aims, apparently, not so much to bring *us* up to *his* level, as to bring *him* down to *ours*.

Yet, as Robert Louis Stevenson has said in his essay on the "English Admirals": "It is, at best, but a pettifogging, pickthank business to decompose actions into little personal motives and ex-

plain heroism away." And he who tarnishes the glory of high public service and who beclouds the light of patriotic ideals, by harping on the minor traits and defects of great Americans, does a sad disservice to his country; for the glory of a country's past should be an illuminating inspiration to the citizens of the future.

In reaction against this style of treatment, it is good for us to turn our attention away from the small things which a great man shares in common with little men, and to consider some of the things which made him great.

Just one hundred years ago last Fourth of July, as Thomas Jefferson died at the age of eighty-three in his beautiful home at Monticello, there lay dying in a modest frame house in the little town of Braintree, in Massachusetts, an old man approaching ninety-one—sturdy John Adams.

For fifty-two years, these men had upheld the same ideals of American liberty—differing only as to the form of its administration. Only three months before their death, these two old statesmen had closed a long and active correspondence with an exchange of letters in which Jefferson had said that his health was indifferent, "but not so my friendship and respect for you," and Adams had said: "Your letter is one of the most beautiful and delightful I have ever received."[1]

I invite your attention, this afternoon, to two features in the life of John Adams which directed the whole course of the history of this country. The Adams whom I wish to call to your mind is not the figure which party foes and Hamiltonian historians have misportrayed as simply a vain, pompous, formal, irritable, envious fighter—but rather the man of whom Jefferson wrote that he was "as disinterested as the Being who made him," that "his deep conceptions * * * and undaunted firmness made him truly our bulwark in debate," and that "to him more than to any other man is the country indebted for our independence."[2]

Of his supreme contributions to American liberty, it is especially appropriate today to recall to you, first, the fact, often forgotten—that it was John Adams who gave George Washington to the Nation.

On May 10, 1775, there met in Philadelphia the second Continental Congress. In spite of the fact that American blood had already been shed in the Concord and Lexington fight, this Congress was distinctly pacific. With the exception of a few radicals like Patrick Henry and Richard Henry Lee of Virginia, Christopher

Gadsden and John Rutledge of South Carolina, and Samuel and John Adams of Massachusetts, most of the delegates were seeking to arrive at conciliation with Great Britain. The delegates from Pennsylvania, New Jersey, and New York and half of Virginia were especially opposed to any move looking towards independence. There was lack of cohesion, cooperation and sympathy between the Colonies. Alone of all the delegates, John Adams, from very early days, had had the intuition and the historic imagination to perceive that the manifest destiny of the American Colonies was ultimate independence—but also that such independence could only be obtained by union. Twenty years before, when a mere youth, he had written that the only "way to keep us from setting up for ourselves is to divide us." Now, at Philadelphia, his one idea and indefatigable effort was to promote that union which must lead to independence. He was the first Nationalist, among all early American patriots. Three things, he saw, were necessary—that the Colonies should throw away their royal charters and establish separate governments; that they should confederate as States; and that they should agree to fight for their independence in common. Far away in Massachusetts, there was a little New England army headed by New England officers, besieging Boston. To nationalize this local rebellion, to nationalize the army, was Adams' chief thought. Yet everything seemed opposed to such an event. The Southern and Middle States, highly jealous and suspicious of New England, were intolerant of a Continental Army commanded by a New England general. If there was to be such an army, they favored, as its head, either General Charles Lee (then at Philadelphia), General Schuyler of New York, or Col. George Washington of Virginia. New England, on the other hand, very reasonably insisted that, as they were doing the fighting with their own troops, the army should be led by one of their own officers, General Artemas Ward, John Hancock or Israel Putnam.

It was John Adams then who grasped the opportunity to cement the union by sacrificing the interests of the men of his own colony. Listen to his story in his own words:

> "Full of anxieties concerning these confusions, and apprehending daily that we should hear very distressing news from Boston, I walked with Mr. Samuel Adams in the State House yard, for a little exercise and fresh air, before the hour of Congress, and there represented to him the various dangers that surrounded us. He agreed to them all,

but said, 'What shall we do?' I answered him that he knew I had taken great pains to get our colleagues to agree upon some plan, that we might be unanimous; but he knew that they would pledge themselves to nothing; but I was determined to take a step which should compel them and all the other members of Congress to declare themselves for or against something. 'I am determined this morning to make a direct motion that Congress should adopt the army before Boston, and appoint Colonel Washington commander of it.' * * * Accordingly, when Congress had assembled, I rose in my place, and in as short a speech as the subject would admit, represented the state of the Colonies, the uncertainty in the minds of the people, their great expectation and anxiety, the distresses of the army. * * * I concluded with a motion, in form, that Congress would adopt the army at Cambridge, and appoint a General; that though this was not the proper time to nominate a General, yet as I had reason to believe this was a point of the greatest difficulty, I had no hesitation to declare that I had but one gentleman in my mind for that important command, and that was a gentleman from Virginia, who was among us and very well known to all of us, a gentleman whose skill and experience as an officer, whose independent fortune, great talents, and excellent universal character, would command the approbation of all America, and unite the cordial exertions of all the Colonies better than any other person in the Union. Mr. Washington, who happened to sit near the door, as soon as he heard me allude to him, from his usual modesty, darted into the library-room."

This was an act of the highest statesmanship. No small man could have conceived or executed that bold stroke. And so it happened that, one day before the Battle of Bunker Hill, Congress notified Col. Washington (as stated in its Journal) of its "choice of him to be general and commander-in-chief to take supreme command of the forces raised and to be raised in defense of American liberty. * * * whereupon Colonel Washington standing in his place, spoke as follows":

> "Tho I am truly sensible of the high honor done me in this appointment, yet I feel great distress from a consciousness that my abilities and military experience may not be equal to the extensive and important trust. However, as the Congress desire it, I will enter upon the momentous duty and exert every power I possess in their service and for support of the glorious cause. I beg they will accept my most cordial thanks for this distinguished testimony of their approbation.

> "But lest some unlucky event should happen unfavorable to my reputation, I beg it may be remembered by every gentleman in the room that I, this day, declare with the utmost sincerity, I do not think myself equal to the command, I am honored with."

The contemporary view of Washington's appointment may be gathered from a rarely quoted letter by a Connecticut delegate in Congress, who wrote, the next day, that it "removes all jealousies, more firmly cements the Southern to the Northern," and was "absolutely necessary in point of prudence. But he is clever, and if anything too modest. He seems discreet and virtuous, no harum-scarum, ranting, swearing, fellow, but sober, steady and calm. His modesty will induce him, I dare say, to take and order every step with the best advice possible to be obtained in the army."[3]

It was the choice of Washington as Commander-in-Chief which ensured a national conduct of the War and an union of interest between the Colonies. Not only, however, was it John Adams who thus started this country on the road to becoming a nation; but it was also John Adams who made certain that this country should continue to be a nation instead of a collection of States. For, twenty-six years later, it was he who, as President, had the foresight to appoint John Marshall as Chief Justice of the United States. "My gift of John Marshall to the people * * * was the proudest act of my life," he said, later. Nothing in our history is more remarkable than the fact that it should have been one man (and he a Northern man from Massachusetts) who gave to our country the two great Virginians—Washington and Marshall, the two great builders of American nationality. If Adams had accomplished nothing more in his long life, his name would deserve to be indelibly stamped on the hearts of all Americans.

But his great service did not stop here. Not only was he the first Nationalist, but he was also the first Constitutionalist; and it should never be forgotten that to him this country owes the form of its State Constitutions and of its Federal Constitution.

So familiar are we today with the framework of our State governments, with their Governors, their two-branch Legislatures and their independent Judiciary, that we unconsciously assume that it was inevitable and necessary that the American Colonies

should adopt that form, when they revolted from Great Britain. The fact is quite the contrary. For, in 1775 and 1776, when the royal charters ceased to operate, the antagonism of the colonists to the broad powers exercised by the Royal Governors and the Royal Judges, and to the restrictions on the action of their Colonial Legislative bodies, was so great that most of them adopted, as their temporary form of government, a single-branch House of Representatives (or Congress), which not only made the laws but executed them (either through a Council or Committees or officers chosen by itself).

When the question arose as to what permanent form of government the States should adopt, there was presented a problem new in history. It has been well said that: "To disrupt an empire was not new. It was not new to overthrow government. But to overturn thirteen royal provinces, and, without intervening anarchy, to set up in their stead thirteen independent governments; to loose the bonds of an empire and reform the contiguous parts into an united whole, with such coherence as enabled it to maintain itself against formidable odds—this was something new in history, and to many seemed impossible."[4]

Fortunately, there was in Congress one man, and one alone, who, all his life, had made a profound study of the theory of government. At the age of twenty-three, John Adams had written in his diary as a goal for his future: "Aim at an exact knowledge of the nature and means of government. Compare the different forms of it with each other and each of them with their effects on public and private life." The principles of government, he wrote, later, were to be learned, not so much from the conclusions of philosophers and political scientists as from the observation and study of "human nature, society and universal history." Now after twenty years of such study, he was in a position to advise and secure its fruition. Most of the Colonies, in 1775, sought the opinion of Congress as to the form of Government they should adopt. That cautious body declined to give any definite view. Accordingly, the delegates turned to Adams; and from the summer of 1775, through the spring of 1776, he was consulted by South Carolina, Virginia, North Carolina, Pennsylvania, New Jersey, New York and New Hampshire.

It was a novel and unknown thing, at that time—this business of Constitution-making, as may be gathered from what Adams wrote in his *Autobiography*:

"Although the opposition was still inveterate, many members of Congress began to hear me with more patience, and some began to ask me civil questions. 'How can the people institute governments?' My answer was 'By conventions of representatives, freely, fairly and proportionably chosen.' 'When the Convention has fabricated a government, or a Constitution rather, how do you know the people will submit to it?' 'If there is any doubt of that, the Convention may send out their project of a Constitution to the people in their several towns, counties or districts, and the people may make the acceptance of it their own act.' 'But the people know nothing about Constitutions.' * * * 'I believe that in every considerable portion of the people, there will be found some men who will understand the subject as well as their representatives, and these will assist in enlightening the rest.' 'But what plan of a government would you advise?' * * * 'A legislature in three branches, ought to be preserved, and independent judges.' 'Where and how will you get your governors and councils?' 'By elections.' * * * I know that every one of my friends and all those who were the most zealous for assuming governments had at that time no idea of any other government but a contemptible Legislature in one Assembly, with committees for executive magistrates and judges. * * * I took care, however, always to bear my testimony against every plan of unbalanced government."

In this manner, Adams outlined, for the first time in history, the precise course which American States later followed in the formation of their Constitutions. To leading men in each Colony, Adams wrote long letters, setting forth his views as to the proper form of government for the new States. These letters, which were printed and widely distributed, outlined certain fundamental principles which today seem axiomatic and trite, but which were not so then.

John Adams was the first statesman to explain clearly to the people why, if they were to institute a republican form of government, they must keep the three branches of government, the Executive, the Legislative and the Judiciary, separate and independent. To have a republic, you must eliminate arbitrary power and unchecked authority. But, as Adams pointed out, any government in which one body (whether a King or a Legislature) both makes the laws and executes them, is essentially an arbitrary government. It is the essence of a free republic, on the other hand, that no man or set of men shall ever have the power both "to make the law, to decide whether it has been violated and to

execute judgment on the violator." To preserve liberty to the people, there must be restraints and balances and separations of power. Accordingly the frame of government which Adams submitted to those who consulted him provided for a Governor, with power to veto and to appoint officials; a Legislature, consisting of two branches (one as a check upon the other), each eventually to be elected by the people; and a Judiciary, independent and chosen during good behaviour.[5] Such a Constitution differed widely from anything which the Colonies had theretofore considered. Yet, between May, 1776, and December, 1777, practically all the Colonies, save Pennsylvania and Georgia, adopted Adams' plan, in general, in drafting their State Constitutions. New York conformed to it very closely; and Massachusetts, in 1780, adopted as its Constitution, the very draft which Adams wrote for it. Moreover, when in 1787, the Federal Convention met at Philadelphia to frame the Constitution of the United States, it was the Massachusetts and New York State Constitutions to which the delegates resorted for the form and for much of the wording of the immortal document which they signed.

And today the framework of the Constitutions of almost all our States follows that drafted by John Adams in 1780. Rightly may he be termed "The Architect of American Constitutions."

And now, in connection with present day problems, I wish to call your attention briefly to two principles which John Adams embodies in his Massachusetts Constitution. At its very outset, he set forth that principle of separation of powers which he had preached, day in and day out, to the delegates of the Congresses of 1775 and 1776:

> "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers or either of them; to the end it may be a government of laws and not of men."

"To the end it may be a government of laws and not of men." Those are great words. Adams was the first and only man to place them in a Constitution. They are the essential definition of the American system of government. They have been often quoted; yet they cannot be too often impressed on our minds. For they mean that, in this country, there is no right to

the exercise of arbitrary power. They mean that no Legislature shall have power to act contrary to the prohibitions of the Constitution, that it shall have no power to execute its laws after it has made them, that it shall have no power to act as a Court and interpret the meaning of its own laws as it chooses. They mean that no Governor or President shall have power to make laws or to interpret them or to do any act unless authorized by the Constitution or by the Legislature. They mean that every official of the Government shall be bound by the Constitution and the laws, and shall be held responsible in court for every act performed without sanction of law.

These words embody the principle which the Supreme Court of the United States, headed by the great Chief Justice, John Marshall, applied in a famous case, in 1803, when it held that not even a member of the Cabinet was exempt from legal process, and that he must obey the law even if instructed by the President to the contrary. It was this principle that led the Court, in 1866, to hold an act of President Lincoln's invalid as unauthorized by law, and by its decision, it saved a man from execution. It was on this principle that the Court held, in 1882, that instructions given by President Arthur to an army officer could not protect the latter from suit if he trespassed on the rights of a private citizen; by this decision the heirs of Robert E. Lee recovered their rights to Arlington; and in this decision, Judge Miller uttered the immortal words that: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity."

But to constitute a "government of laws and not of men," not only must the Executive and Executive officers be prevented from usurping powers, but the Legislative must be careful not to transfer its powers to the Executive so as to enable the latter to be in the position of making his own laws and then enforcing them. Of late years, there has been a decided tendency in Congress to bring about this latter condition: and this increasing tendency deserves more careful consideration than has hitherto been given to it. Let me mention briefly, for example, a few instances in which Congress has practically (even if not in a Constitutional sense) transferred to the Executive the power of making laws. (I omit entirely the striking instances of transfer of power to the President during the late war.)

In 1912, Congress gave the President power to reorganize

the whole customs service and abolish needless ports and offices, at his discretion. In 1912 and 1916, Congress gave the President power to prescribe the Panama Canal Tolls, to promulgate laws and regulations for asserting the police power in the Zone and for levying excise, license and franchise taxes. Congress, in 1914, gave the President power to suspend provisions of the Seamen's Act, "whenever in his discretion, the needs of foreign commerce may require." Congress, in 1919, gave the President power to exclude any alien he "shall find that the public safety requires." In 1922, Congress by statute granted to the President the power to raise or lower tariff duties within a range of fifty per cent. Only last year, Congress gave to the President power, by the Federal Aviation Act, to set apart and regulate air-space reservations for governmental purposes and for public safety, with penalties for violations of the President's regulations. In various other years, the President has been authorized to execute and enforce interstate quarantine regulations of the Secretary of the Treasury and "adopt such measures as in his judgment shall be necessary," in case State or municipal authorities shall fail to enforce the said regulations. He has been authorized to suspend immigration in case of danger of disease; to suspend importation of any food or drink "adulterated to an extent dangerous to the health or welfare of the people of the United States;" to prevent export of helium gas; to allow foreign yachts to enter without duties or tonnage taxes; to waive provisions as to eight hour day on public contracts; to prevent the landing of submarine cables on our shores.[6]

Much of this Congressional legislation places in the hands of the President arbitrary power to be exercised at his absolute will and discretion and on his uncontrollable determination of facts It displays a decided trend away from the republican principle of a "government of laws and not of men."

We are here confronted not so much with executive usurpation as with legislative abdication.

The trend is even more pronounced when one stops to realize the extent to which Congress has authorized Executive officials other than the President to control the conduct of the citizen by mere Executive or Administrative regulations.

Such statutory authority to make regulations, which shall have the force of positive Federal law, binding as such upon individuals, has been granted by Congress to Executive Depart-

ments and Commissions over a wide and constantly increasing field of subjects. Should all these regulations, which are binding as law, be brought together in one book, it would constitute a volume of over one thousand pages. Every citizen is subject today to this vast bulk of law made by Federal Executive Departments or Commissions (and frequently, in practice, by minor officials); and yet tomorrow every one of these regulations may be changed by the sole whim or judgment of a Department or Bureau head. Moreover, violations of a large part of these regulations have been made criminal offenses by Congress, so that, every day of the year, these Department or Bureau heads may, by their sole act, manufacture new Federal crimes and offenses. Furthermore, last year, in the Federal Aviation Act, Congress took a new step towards increasing the powers of Executive officials; it granted, for the first time in legislative history so far as I can ascertain, the power to a single individual, the Secretary of Commerce, (as well as to "any officer or employee of the Department of Commerce designated by him in writing for the purpose") "to hold hearings, examine witnesses and issue subpoenas for the attendance and testimony of witnesses and the production of books, papers, documents and other evidence" before him. This was an unprecedented extension of power, as to which we may gravely ponder—especially since similar power is granted to the Secretary of Commerce in the Federal Radio Act which has just been enacted this year.

As an illustration of the variety of subjects which the Federal Executive and Administrative officials control simply by regulations, and largely by regulations the violations of which constitute criminal offenses, let me call to your attention the following partial list of subjects. Cutting timber on mineral lands; fire protection for national forests; protection of fur seal animals; game and bird preserves; wild life and fish refuges, national parks; reclamation projects; national forests; water holes; cotton futures; cotton standards; grain standards; naval stores; adulterated seeds; insecticides; nursery stock; honey bees; mailing of plants; standard barrels; packers' stockyards; United States warehouses; contagious animal diseases; virus and toxins; adulterated and renovated butter; white phosphorus matches; neat cattle and horses; animal meats; reservation and protection of air-spaces; cattle transportation; railroad car safety devices; explosives; and narcotics. Two subjects which were formerly regulated by elabo-

rate and detailed provisions of State statutes are now controlled entirely by regulations of Federal officials, practically unrestrained by Congressional legislation. I refer to the subjects of pure foods and drugs, and migratory bird and game.[7] And in addition, there are the Federal rules and regulations as to matters formerly within State control—but now Federalized by the Federal Aid Acts— matters like giving birth to children, road-building, etc.

All this imposition of law and creation of criminal offenses by Executive or Administrative regulation is a far cry from the type of "government by laws" intended by the original framers of our Constitutions. It is small wonder that thoughtful statesmen are now apprehensive at the rapid growth of bureaucratic government, and are looking about for a remedy. One remedy at least is possible and at hand—namely that Congress should do its duty; that it should re-assume its function of legislation, itself; that is should pay more attention to the details of the subjects on which it legislates; and that, it should, as far as practicable, desist from shifting its responsibility and from availing itself of the easy expedient of authorizing bureaucratic officials to regulate the conduct and to prescribe the criminal offenses of citizens of the United States.

One other section drafted by Adams in the Massachusetts Constitution, I wish to call to your attention. It is unique in American Constitutions, and reads (in part) as follows:

> "Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of the rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences and all seminaries of them * * * to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments, among the people."

In the first place, note the words: "Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties." These words supplemented the sentiment which Adams copied from George Mason's Bill of Rights in Virginia that:

> "No free government or the blessings of liberty can be preserved to any people but by * * * frequent recurrence to fundamental principles."

"Liberty," wrote Adams, "cannot be preserved without a general knowledge among the people. * * * Let all become attentive to the grounds and principles of government. * * * Let the public disputations become researches into the grounds and nature and ends of government, and the means of preserving the good and demolishing the evil." To foster education, he said in his Inaugural Address as President, was a governmental duty, not only for "its benign influence on the happiness of life in all its stages and classes, and of society in all its forms, but as the only means of preserving our Constitution from its natural enemies * * *."

It was this same sentiment which inspired Jefferson, in his own first Inaugural, to term, as one of the fundamental necessities of a republican government, "the diffusion of information and arraignment of all abuses at the bar of the public reason." And as he wrote in 1820: "I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is, *not* to take it from them, *but* to inform their discretion by education. This is the true corrective of abuses of constitutional power."[8] "No experiment," he wrote to Judge Tyler, in 1802, "can be more interesting than that we are now trying, and which, we trust, will end in establishing the fact that man may be governed by reason and truth. * * * Our first object should therefore be to leave open to him all the avenues to truth."

In this section of his Massachusetts Constitution, moreover, combined with the section declaring for freedom of religion, Adams embodied the spirit of toleration, which both he and Jefferson held to be fundamental in a republican government—the spirit which surely this country stands in need of cultivating at the present day.

To John Jay, Adams wrote, in 1786, in favor of "a liberal and generous toleration * * * the first right of mankind to worship God according to their consciences." Again he wrote: "I think that when we can enlarge our minds to allow each other an entire liberty in religious matters, the human race will be more happy and respectable." And again, that the three grand objects in view in all our political transactions should be: "Political and civil liberty; liberty of conscience; liberty of commerce."

This was the spirit which Jefferson advocated in his first Inaugural, when he said: "Having banished from our land that religious intolerance under which mankind so long bled and suffered, we have yet gained little if we countenance a political intolerance as despotic, as wicked" * * * "If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as the monuments of the safety with which errors of opinion may be tolerated, where reason is left free to combat it." "I tolerate with the utmost latitude the right of others to differ with me in opinion, without imputing to them criminality," wrote Jefferson to Mrs. John Adams, in 1804. "I know too well the weakness and uncertainty of human reason to wonder at its different results." And again he wrote: "Difference of opinion leads to enquiry and enquiry to truth. * * * We both value too much the freedom of opinion sanctioned by our Constitution not to cherish its exercise, even when in opposition to ourselves." And in his famous statute of Religious Freedom, he had stated: "The opinions of men are not the object of civil government nor under its jurisdiction. To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy."

Freedom of conscience and freedom of opinion—those were principles which Jefferson and Adams insisted lay at the foundations of our Government. They realized that the right of the majority to rule must be accompanied by the minority's right to be heard and to have all avenues to truth open to it.

Last Fourth of July, throughout the States of this country, meetings were held, speeches were delivered, and articles were written, to commemorate the hundredth anniversary of the death of these two great American patriots, and to hold forth their ideals as an inspiration to our people.

In view of many conditions now prevalent in this country, it affords an interesting theme for conjecture; how far the members of the communities in which those commemorative meetings were held really believe and act upon the principles laid down by the founders of our Government. Freedom of conscience and freedom of opinion—how far are those principles anything more than mere words at the present day? How far are they acted upon in practice? How far do we give them more than lip-service? How often do they mean anything more than freedom to agree in thought or speech with what the majority in power thinks right or safe? We

like to believe that this country has carried forward, further than any other, the vital principles of a republican form of government. But when we see the lack of spirit of toleration in so many of the measures of our Legislatures, in so many of the organized societies, and in so many of the speeches and editorials of today, we may well put to ourselves the question: "Have we, in this Twentieth Century, advanced so far beyond the past generations, as we sometimes boast?"

In the Seventeenth Century, it was a great Englishman, John Milton, who wrote: "Give me liberty to know, to utter, and to argue freely, according to conscience, above all liberties." In the Eighteenth Century, it was a great Frenchman, Voltaire, who stated to an opponent: "I hate and detest what you say, but I will defend with my life, if need be, your right to say it." In the Nineteenth Century, it was a great American, Thomas Jefferson, who wrote: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."

Those are inspiring words. Do they represent the belief or the basis of action of the average American legislator and of the average American official and of the average American citizen, at the present day? That is a question which we may, very searchingly, put to ourselves.

Above all liberties, "the liberty to know, to utter and to argue freely according to conscience"—"eternal hostility against every form of tyranny over the mind of man." Certainly, that is the spirit which must inspire the education which Adams and Jefferson said the Government must foster. Does American education mean that, in all the States of this country today? And if not, how shall it be made to mean that? Those are problems which you graduates of this University must do your part to work out, if you would be worthy of the great Americans who founded your country.

NOTES.

(1) *Works of John Adams* X, 10-12, Adams to Dr. Benjamin Rush, Dec. 25, 1811: "As if I had ever considered Jefferson as my enemy. This is not so. I have always loved him as a friend. If I ever received or suspected any injury from him, I have forgiven it long and long ago. * * * I know no difference between him and myself relative to the Constitution or to forms of government in general. In measures of administration we have differed in opinion." *Correspondence of John Adams and Thomas Jefferson* (1925) by Paul Wilstach. Jefferson to Adams March 25, 1826; Adams to Jefferson, April 17, 1826.

(2) *Writings of Thomas Jefferson* (Washington Ed.) II, 607, to Madison, 1787; *Writings of Thomas Jefferson* (Ford's Ed.) XI, 280; XII, 306, 119; to W. P. Gardner, Feb. 13, 1813; to Madison, Aug.

30, 1823; to Samuel A. Wells, May 12, 1819, *Mass. Hist. Soc. Proc.* XLVI, 405 et seq, memoranda of an interview with Jefferson, by Selma Hale (1818): "No history has done him justice. * * * In his zeal for independence, he was ardent; in contriving expedients and originating measures he was always busy; in disastrous times when gloom sat on the countenances of most of us, his courage and fortitude continued unabated and his animated exhortation restored confidence to those who wavered. He seemed to forget everything but his country and the cause which he espoused. * * * It was at these times when the rest of us were dispirited and silent that the loud voice of John Adams, the Ajax of the body, resounded through the hall, revived our spirits and restored our confidence. To him more than to any other man is the country indebted for our independence."

(3) *Letters of Members of the Continental Congress*, I, 127-218. Eliphalet Dyer, to Joseph Trumbull, June 17, 1775.

(4) *John Adams, the Statesman of the American Revolution* (1898) by Mellen Chamberlain, p. 73; *The Politics of John Adams*, by Anson D. Morse, *Amer. Stist. Rev.* (1899) V.

(5) *Works of John Adams IV*, 194, 203. "Thoughts on Government applicable to the present state of America" (Jan. 1776); Adams to John Penn (Jan. 1776). Adams to Richard Henry Lee, Nov. 15, 1775; "A legislative executive and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the Constitution." Adams to H. Niles, Feb. 13, 1818: "The Colonies had grown up under Constitutions of government so different, there was so great a variety of religions, they were composed of so many different nations, their customs, manners, and habits had so little resemblance, and their intercourse had been so rare, and their knowledge of each other so imperfect, that to unite them on the same principles in theory and the same system of action, was certainly a very difficult enterprise. The complete accomplishment of it, in so short a time and by such simple means, was perhaps a singular example in the history of mankind."

(6) For transfer of legislative powers to the President, see the following Acts: Aug. 24, 1912, c. 355 (37 Stat. 417); Aug. 24, 1912, c. 390 (37 Stat. 560); Aug. 21, 1916, c. 371 (39 Stat. 527); Aug. 18, 1914, c. 256 (38 Stat. 698); Nov. 10, 1919, c. 104 (41 Stat. 353); Sept. 21, 1922, c. 356, sec. 315 (42 Stat. 941); May 20, 1926, c. 344 (44 Stat. 568); Feb. 15, 1893, c. 114 (27 Stat. 452); March 3, 1887, c. 339 (24 Stat. 475); Aug. 30, 1890, c. 839 (26 Stat. 414); March 3, 1925, c. 126 (43 Stat. 1111); May 28, 1908, c. 212 35 Stat. 424); June 19, 1912, c. 174 (37 Stat. 137); May 28, 1908, c. 211 (35 Stat. 414); May 27, 1921, c. 12 (42 Stat. 8).

The President has even been granted power to annex territory to the United States; for, by an Act of Congress, whenever a United States citizen discovers guano on any rock or island not legally claimed by another government or its citizens, such rock or island may "at the discretion of the President be considered as appertaining to the United States." Act of Aug. 18, 1856, c. 164 11 Stat. 119), Rev. Stat. Sec. 5570; see *Jones v. United States* 1890) 137 U. S. 202.

(7) For statutes granting to Department heads the power to make regulations, see June 3, 1878, c. 150 (20 Stat. 89); June 4, 1897, c. 2 (30 Stat. 38); Feb. 1, 1905, c. 288 (33 Stat. 628); Feb. 14, 1903, c. 552 (32 Stat. 501); June 5, 1920, c. 247 (41 Stat. 986); June 7, 1924, c. 346 (43 Stat. 652); Aug. 25, 1916, c. 408 (39

Stat. 538); June 2, 1920, c. 218 (41 Stat. 732); June 7, 1924, c. 348 (43 Stat. 655) and three earlier acts; Aug. 21, 1916, c. 360 (39 Stat. 518); Aug. 11, 1916, c. 313 (39 Stat. 480); March 4, 1923, c. 288 (42 Stat. 1519); Aug. 11, 1916, c. 319 (39 Stat. 485); March 3, 1923, c. 217 (42 Stat. 1436); Aug. 24, 1912, c. 382 (37 Stat. 506); April 26, 1910, c. 1191 (36 Stat. 331); Aug. 20, 1912, c. 308 (37 Stat. 319); Aug. 31, 1922, c. 301 (42 Stat. 834); March 4, 1915, c. 144 (38 Stat. 1113); Aug. 3, 1912, c. 273 (38 Stat. 1187); Aug. 15, 1921, c. 64 (42 Stat. 163); Aug. 11, 1916, c. 313 (39 Stat. 448); July 3, 1926, c. 772 (44 Stat. 887); June 30, 1906, c. 3915 (34 Stat. 768); March 4, 1913, c. 141 (37 Stat. 736); May 29, 1884, c. 60 (23 Stat. 32); March 3, 1905, c. 1496 (33 Stat. 1265); March 4, 1913, c. 148 (37 Stat. 832); May 9, 1902, c. 784 (32 Stat. 196); April 9, 1912, c. 75 (37 Stat. 81); Sept. 21, 1922, c. 356 (42 Stat. 937); March 4, 1907, c. 2907 (34 Stat. 1260); May 20, 1926, c. 344 (44 Stat. 570).

(8) *Writings of Thomas Jefferson* XII, 161, to W. C. Jarvis, Sept. 28, 1820.

(9) *Works of John Adams* VIII, 311, 382; IX, 451, 524; X, 415-416; to Jay, Jan. 4, 1786; to William White, Feb. 28, 1786; to James Warren, Feb. 3, 1777; to Charles Spencer, March 24, 1784; to Jefferson, Jan. 23, 1825. "Of laws making it criminal blasphemy to deny or doubt the divine inspiration of all the books of the Old and New Testaments," he wrote to Jefferson: "I think such laws a great embarrassment, great obstruction to the improvement of the human mind."

(10) *Writings of Thomas Jefferson* (Washington Ed.) VI, 447; VIII, 310, to Mrs. Adams, Sept. 11, 1804; to Mr. Wendover (1815). *Writings of Thomas Jefferson* (Ford's Ed.) IX, 146, to Benjamin Rush, Sept. 23, 1800.

Note.

In addition to what Mr. Warren says, an interesting sidelight is thrown on John Adams and some of the personal remarks which appear in his writings, by the following passage from a private letter to Samuel Chase, written on June 14, 1776, in the midst of the final struggle in the Continental Congress of the Declaration of Independence:

> "I have no objection to writing you facts, but I would not meddle with characters for the world. A burnt child dreads the fire. I have smarted too severely for a few crude expressions written in a pet to a bosom friend, to venture on such boldnesses again. Besides, if I were to tell you all that I think of all characters, I should appear so ill natured and censorious that I should detest myself. By my soul, I think very heinously, I cannot think of a better word, of some people. They think as badly of me, I suppose; and neither of us care a farthing for that. So the account is balanced, and perhaps, after all, both sides may be deceived, both may be very honest men." (Works, IX., 396.)